Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AUDIO ODYSSEY, LTD., DOGAN A. DINCER, and ANN M. DINCER,

Petitioners,

v.

BRENTON FIRST NATIONAL BANK, an Iowa Banking Corporation, MICHAEL M. BLADEL, Sheriff of Scott County, Iowa, JOHN M. NORRIS, Deputy Sheriff of Scott County, Iowa, CHARLES A. BARTON, Deputy Sheriff of Scott County, Iowa, JOHN C. BRADLEY, CHRIS A. PIEPER, MERCHANTS BONDING COMPANY (Mutual), BERNARD J. HOFMANN, and ANDERSON & NELSON, P.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Over 75 years of Iowa Civil Procedure jurisprudence requires the service of an original notice (summons) before the court obtains jurisdiction. The Eighth Circuit has sanctioned an *ex parte* replevin without the service of an original notice. Can the Eighth Circuit's opinion stand in conflict with 75 years of Iowa Civil Procedure?

The Iowa replevin statute prior to *Fuentes v. Shevin*, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972), was in many respects identical to that of the Pennsylvania and Florida statutes struck down. The Iowa Supreme Court struck down the Iowa replevin statute for want of notice in 1972 in *Thorpe Credit, Inc. v. Barr*, 200 N.W.2d 535 (1972). In response, the Iowa legislature amended the replevin statute, unequivocally stating that the new act requires notice. The question is whether the Eighth Circuit's sanction of the application of an *ex parte* replevin writ conflicts with the decisions of the Iowa Supreme Court and the legislature of the State of Iowa.

Does the Iowa replevin statute pass constitutional muster under the Fourteenth Amendment where:

A. It has been interpreted to allow *ex parte* proceedings;

B. There is no provision for prompt post-deprivation hearing;

C. The replevin defendant cannot post bond after the turnover;

D. The replevin plaintiff can dismiss his case after an *ex parte* seizure, turnover of property and where the court loses jurisdiction vitiating any post deprivation protections afforded the replevin defendant; and

E. Does the Eighth Circuit sanctioning of such a statute conflict with the opinions of this Court in the line of cases from *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820 (1969), through *North Georgia Finishing Company v. Di-Chem, Inc.*, 419 U.S. 601, 42 L. Ed. 2d 751, 95 S. Ct. 719 (1975).

LIST OF PARTIES

Roger Hoffman, a defendant below, was dismissed in the district court.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Audio Odyssey, Ltd., states that it is an Iowa corporation in good standing with no corporate parents or affiliates, that it has no publicly traded stock, that Dogan Dincer is the sole shareholder and therefore no publicly held company owns any of Audio Odyssey, Ltd.'s stock.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

Prior to the filing of the case in the United States District Court for the Southern District of Iowa, the Iowa District Court in and for Scott County, case No. 88314, entered several orders including: the Replevin Order dated July 14, 1995; an Order denying a Motion to Dismiss dated August 16, 1995; a handwritten Order allowing access to real estate dated August 31, 1995; an Order denying replevin plaintiff's Motion for Adjudication of Law Points dated March 29, 1996; an Order denying the replevin plaintiff's Motion to Continue Trial dated August 10, 1999; and an Order dismissing replevin entered on September 7, 1999 after replevin plaintiff's Rule 215 unilateral dismissal. (The orders above can be found in the Lodging).

The district court's opinion (per Longstaff, D.J.) dated October 13, 1999, granted summary judgment to defendants Hoffman/Anderson and Nelson and Scott County, defendants. On January 21, 2000 the court granted summary judgment to the Bank defendants. The district court's opinions can be found in Appendices C (54a-67a) and D (68a-105a). The Court of Appeals Panel Opinion (per Sachs, District Judge sitting by designation) is published at 245 F.3d 721 (2001) (Appendix B). The Court of Appeals *en banc* judgment dated April 10, 2002, is at 286 F.3d 498 (8th Cir. 2002) (Appendix A).

STATEMENT OF JURISDICTION

The Court of Appeals entered its *en banc* opinion and order on April 10, 2002. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of pertinent statutes are 42 U.S.C. § 1983, reprinted in Appendix E at p. 107a. Code of Iowa, Chapter 643, 1973, is attached at Appendix E at pp. 108a-114a. Code of Iowa, Chapter 643, replevin, 1975, is at Appendix E at pp. 115a-121a, and Code of Iowa, Chapter 643 replevin, 1995, is at Appendix E at pp. 122a-129a. The Iowa Rules of Court are attached as Appendix E at pp. 130a-132a. Amendment Four to the Constitution of the United States and Amendment Fourteen to the Constitution of the United States are attached as Appendix E at pp. 106a and 106a, respectively.

STATEMENT OF THE CASE

This case involves a writ of replevin obtained *ex parte* by attorneys for Brenton Bank on July 14, 1995. The writ provided for seizure of inventory and other personal property at Audio Odyssey, an electronics store. However, when Scott County Sheriff Deputies pointed out that the Bank was not prepared with moving vans to take the inventory, the Bank, through its attorney, directed the Sheriff's deputies to seize the real property itself and locked the plaintiffs out of their business, which the deputies did. Plaintiffs were kept from returning to their business for several weeks. No court order ever authorized the seizure of real property.

No original notice was issued by the replevin plaintiffs and served on the replevin defendants until almost one month after the *ex parte* seizure.

Because the seizure was without notice and a pre-deprivation hearing, plaintiffs were deprived of property without due process under the Fourteenth Amendment. 42 U.S.C. § 1983 allows for causes of action whenever plaintiffs are deprived of constitutional rights under color of state law, which clearly occurred here.

While the panel opinion reversed the district court's grant of summary judgment on all counts as to all defendants as far as the Fourth Amendment was concerned, the panel decision let stand the Fourteenth Amendment dismissal on summary judgment. The *en banc* opinion did not disturb the Fourteenth Amendment ruling and found that the Fourth Amendment seizure of real estate was unreasonable with the possible exception of the initial seizure. But 6 weeks was unreasonable.

The district court and both the panel and the *en banc* decisions of the Eighth Circuit resolved all factual disputes against the non-movant in violation of established summary judgment law. *Celotex Corp. v. Cattrett*, 477 U.S. 317 (1986).

After Dogan Dincer had worked at Audio Odyssey for 14 years, several years as a minority shareholder, he purchased the business in October 1991 for $270,000, partially financed through a $200,000 loan from Brenton Bank, guaranteed by the Small Business Administration (SBA).

On July 13, 1995, Mr. Dincer paid $6,983.00 to Brenton Bank, instructing the teller that the payment was to be applied to the June and July monthly payments on the SBA note. Instead, the Bank applied the payment to an overdraft.[1]

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1. The SBA later required the Bank to apply this payment to the SBA note as Mr. Dincer had instructed. This requirement was a condition of the Bank accepting an 85% guaranty of the Dincer loan from the SBA. Ultimately, the Bank applied the payments to the SBA loan as Dincer had directed.

On Friday, July 14, 1995, John Bradley of the Bank hand delivered to Mr. Dincer at 8:50 a.m. a letter from the law firm defendants demanding that Mr. Dincer pay approximately $127,000 by 9:00 a.m. or within 10 minutes of the demand. Dincer called his attorney, informed Mr. Bradley he could not come up with $127,000 within ten minutes, and around noon that same Friday, Dincer's attorney faxed a letter to the attorneys for the Bank, the Anderson & Nelson law firm, stating that Audio Odyssey was not in default and that the attorney was authorized to accept service. The demanded amount did not include a reduction for the July 13 payment.

With no service on the Dincers' attorney, and no notice to plaintiffs, the Bank's attorney, Bernard Hofmann, filed a Petition in Replevin at 1:44 p.m. on July 14, 1995. At 2:07 p.m., an Iowa District Court Judge entered an Order of Replevin and the Clerk's office issued the Writ of Replevin authorizing the Bank to replevy "all inventory, fixtures, accounts, furniture, equipment, and machinery." Nothing in the Petition, the Writ or Order made any reference to seizing real estate or locking plaintiffs out of their premises.

At approximately 3:15 p.m., Mr. Hofmann delivered the Writ to the Scott County Sheriff's Office and requested that someone serve the Writ immediately. Sergeant Barton of the Sheriff's Office asked Attorney Hofmann if the Bank had trucks lined up to take the inventory.

Hofmann's answer was no. Sergeant Barton explained that replevins usually took several days because of the need to line up the trucks, and to inventory the personal property as it is removed from the premises.

Hofmann called Bradley at the Bank to ask what to do. Bradley said that they should change the locks and lock plaintiffs out. Attorney Hofmann asked Barton if the Sheriff's Department could do that and Sergeant Barton said yes. Hofmann then completed a form entitled, "Directions to Sheriff", which indicated that Bradley would meet the Sheriff's Deputies "at store with a locksmith." Bradley then met the deputy as agreed.

Deputy Sheriff John Norris went to Audio Odyssey, served the Writ and no other documents on Dincer, met Bradley and the locksmith at the premises, and told all customers, employees and Mr. Dincer to leave the premises. Although the Writ provided only for seizure of personal property, the Sheriff seized the real property on which Audio Odyssey rests, gave the keys to the premises and the security system to Brenton Bank representatives, and placed "No Trespassing" signs on the property. They had no authority from the landlord, Frank G. Brown, Jr., to do this.

The signs remained posted after the property was seized until August 31, 1995, despite a certified letter to the Scott County Sheriff sent on August 2, 1995 demanding return of the property. An Original Notice, the summons form used in Iowa, was not issued and served until August 9, 1995. Because the Iowa replevin statute does not provide for a post-deprivation hearing, it was only after the replevin defendant raised procedural and constitutional questions, that the state court entertained an evidentiary hearing, five weeks after the business closing, on August 22, 1995. It was established at that hearing that in fact insurance was in place on July 14, 1995, and that the Bank, in effect, admitted that there was no exigent circumstance justifying the *ex parte* replevin.

The replevin suit was eventually voluntarily dismissed by the Bank in September of 1999 just prior to a jury trial without a judgment and without the evidentiary hearing initially commenced on August 22, 1995 ever having been completed.

On May 16, 1997, plaintiffs filed their Complaint against the Bank defendants and the Scott County defendants, and on July 14, 1997, filed their Complaint against Hofmann and his law firm. By its Orders dated December 15, 1997, the District Court granted the Motion to Dismiss of Roger Hoffman (of the SBA) in case No. 10082, and granted motions by all defendants in both cases to dismiss the claims of Dogan Dincer and Ann Dincer for lack of standing.

After consolidating the cases on plaintiffs' motion on June 30, 1999, on October 13, 1999 the court granted motions for summary judgment by the Hofmann/Anderson & Nelson defendants and the Scott County Defendants. On January 21, 2000, the court granted the Motion for Summary Judgment by the Bank defendants, dismissed the remaining state pendents claims, and entered a final judgment on January 25, 2000. Plaintiffs timely appealed this judgment to the Eighth Circuit on February 23, 2000. The panel decision reversing and remanding was issued on April 6, 2001. Petitioners (plaintiffs/appellants below) filed a Petition for Rehearing by Panel and defendants/appellees/respondents filed Petitions for Rehearing *En Banc* in the Eighth Circuit. Those latter petitions were granted and rehearing argued on September 13, 2001. The Eighth Circuit's *en banc* opinion was issued April 10, 2002. Plaintiffs timely filed this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE EN BANC DECISION CONFLICTS WITH THE UNITED STATES SUPREME COURT'S DECISION IN *FUENTES* AND ITS PROGENY AND THE IOWA SUPREME COURT'S DECISION IN *THORP.*

In 1973 the Iowa General Assembly changed the Iowa Replevin Statute to comply with both *Fuentes* and *Thorp. Id.*[2] The law was enacted the year **before** the *Mitchell* decision. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), is not relevant in the context of interpreting § 643.5. *Fuentes* and *Thorp* are pertinent.

> *Fuentes* held that in the absence of 'extraordinary situations,' a debtor could not be deprived of a significant property interest unless provided with notice and a pre-deprivation opportunity to contest the creditor's claim.

(Panel dec. p. 8). The Supreme Court did not leave the term "extraordinary situation" undefined. The situation must be "truly unusual" and meet three criteria.

> First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second,

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2. It is of note that in *Fuentes* the Pennsylvania appellants had a post-seizure remedy available to them as did the appellants in *Sniadach. Id.* (*Fuentes* Footnotes 9 & 15) Georgia too had motion procedures available to the plaintiffs in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).

> there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a governmental official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Fuentes, 407 U.S. 91. The Court did narrow its holdings in *Mitchell*, but the law in Iowa was changed the year before that decision to comply with *Fuentes* and *Thorp*.[3]

Prior to *Fuentes*, the Iowa replevin statute was "in all material aspects identical" to the Florida statute found unconstitutional in *Fuentes*. In *Thorp* the court found that the holding in *Fuentes* compelled the court ". . . to declare unconstitutional and invalid sections 643.5 and 643.6, the Code for their want of notice and judicial hearing requirements prior to seizure." *Thorp* 536-537. The Iowa Supreme Court has not refined or narrowed its holding.[4]

This case is more akin to those cases depriving a claimant "by virtue of which he was presently entitled to exercise ownership dominion over real or personal property, or to pursue a gainful occupation." *Lujan, et al. v. G&G Fire Sprinklers, Inc.*, 532 U.S. __ (2001), citing *United States v.*

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3. In *Fuentes*, the Court found that the requirement of a bond and the making of allegations concerning the right to specific goods were ". . . hardly a substitute for a prior hearing, for they test no more than the strength of the applicant's own belief in rights." *Id.*

4. Except for the use of gender-biased pronouns, the language used in § 643.5 after the change from the 1973 Code, was the same in 1975 and 1995.

James Daniel Good Real Property, 510 U.S. 43 (1993); *FDIC v. Mallen*, 486 U.S. 230 (1988); *Barry v. Barchi*, 443 U.S. 55 (1979), and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

II.

THE EIGHTH CIRCUIT OPINION DIRECTLY CONFLICTS WITH IOWA RULES OF CIVIL PROCEDURE AND WITH DECISIONS OF THE SUPREME COURT OF THE STATE OF IOWA REQUIRING THE ISSUANCE OF SERVICE OF AN ORIGINAL NOTICE (SUMMONS).

A. Iowa Rules Of Civil Procedure Require Notice To Defendant Prior To The Court Assuming Jurisdiction.

Iowa Code § 643.2 provides that a replevin action shall be tried by "ordinary proceedings", and the Panel found that this term incorporated the Iowa Rules of Civil Procedure. In fact, under Iowa law it is **only** by following these rules that the court can obtain jurisdiction in a civil action. Specifically, compliance with Rule 50 is necessary for a court to obtain personal jurisdiction over a defendant. *Fisher v. Keller Industries*, 485 N.W.2d 626, 628 (Iowa 1992)[5]

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5. On August 4, 1995, Audio Odyssey filed a Motion to Dismiss based on several issues, one of which was that § 643.2 provided that a replevin action was to be by "ordinary proceedings", and the Iowa Rules of Civil Procedure would apply. The motion further detailed that no "Original Notice" had been issued or served, and that Brenton First National Bank had not properly invoked the jurisdiction of the court. Judge de Silva's order in response to Audio Odyssey's Motion to Dismiss does not address the issue of jurisdiction raised in relation to § 643.2. He does state that under § 643.5 notice need not be given.

Rule 50 of the Iowa Rules of Civil Procedure requires that original notice and a copy of the petition be served upon the defendant. The "Original Notice" is the formal writing, issued by authority of law, for purpose of bringing defendants into court to answer plaintiff's demands in a civil action. *Jacobson v. Leap*, 88 N.W.2d 919, 921 (Iowa 1958). It contains specific information, including the amount of time the defendant has to answer. (R.C.P. 49(a)). In the circumstances of this case, defendants would have had twenty days to answer the petition unless the court issued an order prescribing a different amount of time. (R.C.P. 53)

Proof of service must be filed in the clerk's office before action is to be taken by the court. (R.C.P. 82 (g)). This ensures that service was made because ". . . a proper return is ordinarily necessary, and without it the trial court is not authorized to find that it has jurisdiction." *Gray v. Lukowski*, 241 N.W.2d 35, 39 (Iowa 1976).

B. Iowa Courts Steadfastly Require Strict Compliance With Iowa Rules For Jurisdiction To Attach.

The Iowa Supreme Court has consistently found compliance with Rule 50, requiring notice of action is mandatory, jurisdictional and has statutory status. *Fisher v. Keller Industries*, 485 N.W.2d 626, 628 (Iowa 1992); *Marks v. Shinrone, Inc.*, 220 N.W.2d 889, 890 (Iowa 1974); *McArtor v. Pete's Cafe*, 175 N.W.2d 369, 371 (Iowa 1970); *White v. O'Neill*, 164 N.W.2d 79, 80 (Iowa 1969); *Gordon v. Doden*, 154 N.W.2d 146, 147 (Iowa 1967); *Parkhurst v. White*, 118 N.W.2d 47 (Iowa 1962).

In *White v. O'Neill, id.*, defendants, in an action brought for injuries sustained in an automobile accident, challenged

the jurisdiction of the court due to the lack of a salutation clause in the original notice which was required by Rule 50, R.C.P., as it was in effect at that time. The Iowa Supreme Court determined that the lack of a salutation on the original notice was enough of a substantial departure from the Rule, that the court had not acquired jurisdiction. The court said, "There is danger in permitting courts to assume jurisdiction to determine and dispose of the rights of parties, upon notice that is not addressed to the party, and in which he is not distinctly informed that his presence is required to protect his interests." *Id.* 81 This case is indicative of the importance placed upon "Original Notice" in Iowa.

A more recent case, *Committee for Better Government by J. Lowell Simons v. The Honorable Judge Stephen P. Carroll*, Iowa App. 1995 No. 4-400/94-0500, provides even further evidence of the need for strict compliance with the rule requiring proper service of original notice. In that instance the Iowa Court of Appeals affirmed the district court's finding that the defendant had not been served appropriately, and that the plaintiff's action should be dismissed with prejudice. The plaintiff had given notice by publication, and stated he had both mailed notice to the defendant and had given the notice to the deputy clerk of court to give to the defendant. However, these forms of service were found inappropriate. Thus, even though the defendant may have knowledge of a suit against him, this knowledge does not negate the need for original notice as required by rule.

It is a basic principle of our legal system that a Court must have personal jurisdiction over the parties. A Court does not have personal jurisdiction over the parties if they were not served proper notice of the action. *See Holmes v. Polk City Savings Bank*, 278 N.W.2d 32, 34 (Iowa 1979); *City of Oelwein v. Dvorsky*, 380 N.W.2d 739, 741 (Iowa App. 1985).

Thus, in order for the court to obtain jurisdiction under Iowa law, Audio Odyssey would have had to have been served with "Original Notice."

When, as in this case, the defendant challenges the personal jurisdiction of the court, the burden shifts to the plaintiff to sustain the requisite jurisdiction by showing that adequate and timely service has been made. *Dennis v. Christianson*, 482 N.W.2d 448, 450 (Iowa 1992). The Bank could not meet this burden because service of the "Original Notice" did not occur until August 9, 1995, and proof of service was not filed until the next day, August 10. To make matters more confusing, the "Original Notice" that was received on August 9 stated,

> You are further notified that unless, within 20 days after service of this original notice upon you, you serve, and within a reasonable time thereafter file a motion or answer, in the Iowa District Court for Scott County, at the courthouse in Davenport, Iowa, judgment by default will be rendered against you for the relief demanded in the petition.

Since the purpose of a replevin action is to determine who should have possession, *Barry v. State Sur. Co.*, 1967, 261 Iowa 222, 154 N.W.2d 97, and since Judge Havercamp had already issued a Replevin Order on July 14, which gave possession of Audio Odyssey's inventory, fixtures, accounts, furniture, equipment and machinery to the Bank, and thereafter, the Clerk of Court issued a Writ to the Sheriff and the keys "turned over to the bank," the effect was that a judgment had already been rendered against Audio Odyssey.

Under Iowa's Rules of Civil Procedure, on July 14, 1995, Judge Havercamp did not have jurisdiction to issue an order for

seizure of Audio Odyssey's property because no "Original Notice" had been served, nor had a proof of service been filed as required by the Iowa Rules of Civil Procedure in effect on that date. (R.C.P. 48, 49, 50, 53, 82(a), 82(g)).

The failure of jurisdiction demonstrates the unconstitutional application of the statute to these plaintiffs.

III.

THE IOWA REPLEVIN STATUTE REQUIRES NOTICE AND A HEARING BEFORE SEIZURE OF PERSONAL PROPERTY AND A SEIZURE WITHOUT SUCH NOTICE IS UNCONSTITUTIONAL.

The Eighth Circuit's opinion sanctions wholesale seizures without due process and would open up to creditors the means to disenfranchise thousands of debtors in Iowa and elsewhere in the Eighth Circuit.

The Iowa Supreme Court on statutory interpretation:

> When confronted with an issue involving the interpretation of a statute, we begin with the principles of statutory construction. The polestar of statutory interpretation is the intent of the legislature. We seek to ascertain and effectuate the true legislative intent. We must not only examine the language of the statute, but also its underlying purpose and policies, as well as the consequences stemming from different interpretations. In doing so, we must construe the statute in its entirety.

(Internal citations omitted.) *State of Iowa v. Michael Allen Carpenter*, 616 N.W.2d 540, 542 (Iowa 2000).

The court will not construe a statute in a way that would produce "impractical or absurd results." *Mortimer v. Freuhauf Corp.*, 502 N.W.2d 12, 14 (Iowa 1993).

Sections 643.2 and 643.5 are the two sections of the Iowa Replevin Statute that determine the necessity and need for notice prior to seizure of personal property pursuant to that statute. Section 643.2 states:

> The action shall be by ordinary proceedings, but there shall be no joinder of any cause of action not of the same kind, nor shall there be allowed any counterclaim.

Section 643.5 states:

> Upon direction of the court after notice and opportunity for such hearing as it may prescribe, the clerk shall issue a writ under the clerk's hand, and the seal of the court, directed to the proper officer, requiring the officer to take the property therein described and deliver it to the plaintiff.

The Panel decision determined that "ordinary proceedings" incorporated the Iowa Rules of Civil Procedure. The Panel found Audio Odyssey could have obtained a prompt post-deprivation hearing under I.R.C.P. 100. If, in fact, the Iowa Rules of Civil Procedure had applied, there would have been no need for a post-deprivation hearing because Audio Odyssey would have received notice and an opportunity to be heard before the seizure. The Panel also ignored the implicit finding in *Fuentes*, *id.* that general motion practice is not a substitute for a statute requiring a prompt post-deprivation hearing. See footnote 2, p. 7.

In 1973 the Iowa General Assembly passed an act changing §§ 643.5, 643.6 and 643.7 of the Iowa Replevin Statute. This Act was initiated by the Senate Committee on Judiciary, and Senate File 536 of the 65th General Assembly offers this explanation: "This bill requires a hearing before any property may be seized pursuant to the replevin statutes, to accord with both state and U.S. Supreme Court decisions." Therefore, the words "as it may prescribe" cannot mean no hearing. If those words can't mean no hearing, it would be an "absurd result" for those same words to mean no notice.

The language of § 643.5 further indicates that notice is required before a hearing is held. It states ". . . after notice and opportunity for such hearing as it may prescribe, the clerk shall issue a writ under the clerk's hand . . ." It would be impossible to issue the writ **after** a non-event. If there was no notice, the clerk could still issue the writ, but it wouldn't be **after** notice. Therefore, § 643.5 is only reasonably understood if notice is required and the hearing is as prescribed, except the hearing may not be without notice.

The Iowa replevin statute, when read in its entirety, requires both notice and hearing before property may be seized. If, in fact, Judge Havercamp did ask "Hofmann whether the state's replevin statute required notice to the defendant" as the Panel's decision states, he was asking the fox to guard the hen house. To ask opposing counsel what the rights of their adversaries are is an open invitation to an abuse of those rights.

CONCLUSION

When the Iowa replevin statute requires the action to be by ordinary proceedings which incorporates the Iowa Rules of Civil Procedure, these rules have the force and effect of statutes. The rules require notice to the defendant of any action filed against him and an opportunity to respond to the allegations before the court takes any action. When the court issued the Replevin Order on July 14, 1995 that authorized the seizure of Audio Odyssey's personal property, it did so without jurisdiction.

Based on the foregoing, appellants respectfully request that their petition for *certiorari en banc* be granted because the Eighth Circuit's decision changes the replevin law in the state of Iowa, a role constitutionally limited to the legislative branch of government; conflicts with Iowa's Rules of Civil Procedure, the United State Supreme Court's decision in *Fuentes* and the Iowa Supreme Court's decision in *Thorp*. Further, the Panel's decision allows a court to seize personal property without having first obtained personal jurisdiction. Finally, the decision would allow (as in this case) the *ex parte* seizure of goods, the replevin plaintiff's unilateral dismissal of suit under former Rule 215 and discharge of bond before the Original Notice is ever served.

The Appellants respectfully request that Part III of the Panel's decision be vacated; that the Iowa Replevin Statute be found to require notice as outlined in the Iowa Rules of Civil Procedure, and that it be found that the statute was applied unconstitutionally in this case. In the alternative, Appellants respectfully request that this Court find the Iowa replevin scheme unconstitutional.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED APRIL 10, 2002

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 00-1634

Audio Odyssey, Ltd., an Iowa Corporation; Dogan A. Dincer; Ann M. Dincer,

Appellants,

v.

Brenton First National Bank, an Iowa Banking Corporation; Michael M. Bladel, Sheriff of Scott County, Iowa; John M. Norris, Deputy Sheriff of Scott County, Iowa; Charles A. Barton; John C. Bradley; Chris A. Pieper; Roger Hoffman; Merchants Bonding Company, a Corporation,

Appellees.

Audio Odyssey, Ltd., an Iowa Corporation; Dogan A. Dincer; Ann M. Dincer,

Appellants,

v.

Bernard J. Hofmann; Anderson & Nelson, a professional corporation,

Appellees.

Appendix A

Submitted: September 13, 2001
Filed: April 10, 2002

Before WOLLMAN,[1] Chief Judge, McMILLIAN, BOWMAN, LOKEN, HANSEN, MORRIS, SHEPPARD, ARNOLD, MURPHY, BYE, and RILEY, Circuit Judges.

BYE, Circuit Judge.

Audio Odyssey and its owners brought a variety of claims under 42 U.S.C. § 1983 and state law against Brenton First National Bank, the Bank's attorney and law firm, the Bank's bonding company, various Scott County officials, and a loan officer of the Small Business Administration (SBA). The claims sought redress for the defendants' mishandled execution of an *ex parte* writ of replevin authorizing the seizure of Audio Odyssey's inventory, fixtures, accounts, furniture, equipment and machinery.

The district court dismissed the owners' individual claims for lack of standing as well as Audio Odyssey's § 1983 claim against the SBA loan officer. The district court later granted summary judgment to the defendants on all federal claims and subsequently dismissed the remaining state law claims under 28 U.S.C. § 1367(c).

Audio Odyssey and its owners perfected an appeal from the district court's multiple adverse rulings. A divided panel

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1. The Honorable Roger L. Wollman stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on January 31, 2002. He has been succeeded by the Honorable David R. Hansen.

of our court affirmed in part, reversed in part, and remanded for further proceedings. *Audio Odyssey, Ltd. v. Brenton First Nat'l Bank*, 245 F.3d 721 (8th Cir. 2001). We granted rehearing en banc, vacated the panel opinion, and heard additional arguments. Having considered the many issues raised by the parties' suggestions for panel rehearing and rehearing en banc, we now reinstate the panel opinion in full.

The panel opinion addresses the full array of issues presented in this appeal in considerable detail. We cannot improve upon that opinion's discussion, but we do feel obliged to respond briefly to the thoughtful dissenting opinion, which now offers three arguments suggesting the absence of any Fourth Amendment violations.

First, the dissent states "it was constitutionally reasonable for the sheriffs to construe the writ as authorizing them to close the store for a reasonable period while the replevied property was inventoried and removed." *Post* at 8. While true, this statement does not go far enough. Tabulating and removing Audio Odyssey's personalty undoubtedly took time. Had the Bank and the sheriff moved expeditiously to inventory and remove Audio Odyssey's property while the store was closed, a Fourth Amendment claim would surely fail. But that is not what transpired. The Bank was unprepared to cart away Audio Odyssey's personalty on Friday, July 14, or even Monday, July 17 — despite the sheriff's requirements to this effect. Instead, the Bank and the sheriff dallied until the middle of that week even to *commence* their inventorying. During that period, the defendants unreasonably deprived Audio Odyssey of its leasehold estate. Audio Odyssey was entitled to possess the store premises even though it was not

entitled to some of its personalty. And Audio Odyssey's interest was hardly ephemeral. Among other aspects of its business, it operated a service center and repair department. It serviced warranty claims and received consignments of other electronic equipment owned by consumers for resale in which the Bank had no financial or security interest whatsoever. Beyond that, there were product lines (Sony, for example) located upon the premises also held for resale in which the Bank did not own a security interest and to which the replevin order did not apply.

The value of being allowed to continue in business without the inventory financed by the bank at its disposal may not have been conceptualized in its business plan as initially intended, however, there remained a legitimate business interest in continuing viable operations after the replevin action ran its course pursuant to the court order. While such value may not have been substantial, Audio Odyssey is nevertheless entitled to the consideration of damages, even if nominal (and the retention of its supplemental state law claims in the district court) for the constitutional violation.

Second, the dissent relies on a three-party lease assignment only partially executed by Audio Odyssey and the Bank, but not the landlord: "the lease assignment forecloses Audio Odyssey's claim that the initial entry violated its Fourth Amendment rights." *Post* at 10. Assuming *dubitante* that the lease assignment is valid in the first place, we fail to understand how the dissent's argument furthers the analysis. The panel opinion did not hold, nor do we, that the initial entry alone violated the Fourth Amendment. To the extent

the lease assignment may be read to permit the Bank to take possession of the store premises in order to remove or sell the personalty, this right would not extend further than the writ of replevin the Bank actually obtained and executed. And even if the lease assignment permitted the Bank to transfer possessory interest to another party, the facts of this case reveal the Bank never took such action. Thus, the arguments advanced above explain adequately why the defendants' seizure under that writ was constitutionally impermissible.

Third, the dissent appears to argue the defendants did not violate the Fourth Amendment because Audio Odyssey bears some measure of blame for making no attempt to seek judicial relief to reacquire the store property. *Post* at 11-12. We do not believe the record fully supports this characterization of Audio Odyssey's conduct after the seizure was accomplished. In any event, Audio Odyssey's delay — if such it was — may well reflect its minimal damages. Perhaps its owner did not act more quickly because little could be done to salvage the business's good name and capital investment. But this point would do nothing to vitiate an underlying Fourth Amendment violation. Defendants who violate the Fourth Amendment must be held accountable for their actions, even if the ultimate measure of damages assessed seems hardly to justify the time and expense of litigation. A failure to mitigate damages is not an affirmative defense to a constitutional tort. And it is not the law that state actors may violate the constitutional rights of others, yet avoid liability for their actions simply because the injured victim does not suffer very much.

Appendix A

HANSEN, Chief Judge, specially concurring.

I concur in the court's reinstatement of the prior panel opinion, which affirmed in part, reversed in part, and remanded the case to the district court, *except* I do not concur in those portions of Part IV A and Part IV B of the prior panel opinion which hold that the initial execution of the writ of replevin by the deputy sheriff on Friday afternoon by closing the store and changing its locks constituted an unreasonable seizure of Audio-Odyssey's leasehold interest in violation of the Fourth Amendment. In my view, the initial seizure was constitutionally reasonable, and the sheriff's department's seizure of the premises only became unreasonable under the Fourth Amendment when the inventorying deputy turned the newly minted keys to the store over to the Bank on the following Wednesday afternoon after he had inventoried the personal property for the purposes of the writ. To the extent the court's opinion can be read otherwise, I do not concur in it. In order to make my position more clear, I join the dissent's factual recitation, chronology, and the analysis Judge Loken makes in Part A of that dissent; however, I do not join the balance of the dissent.

LOKEN, Circuit Judge, with whom BOWMAN, WOLLMAN, and MURPHY, Circuit Judges, join, dissenting.

I adhere to my dissent from Part IV of the reinstated panel opinion. 245 F.3d at 742-43. Chief Judge Hansen's special concurrence joins Part A of this dissent, which is therefore the opinion of the court overruling Part IV A of the panel opinion.

Appendix A

As the court recognizes, the key to Audio Odyssey's Fourth Amendment claims is "whether there is a triable claim that Sergeant Barton and Deputy Norris committed a constitutionally unreasonable seizure of the real property" when they executed the state court's writ of replevin. 245 F.3d at 735. If the state actors did not violate the Fourth Amendment, then Audio Odyssey has no § 1983 claim against their alleged private conspirators, the Brenton Bank and its officers and attorney. *See Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 536 (8th Cir. 1999).

Audio Odyssey contends the deputy sheriffs violated the Fourth Amendment in two ways, by seizing and locking down the store premises on the evening of Friday, July 14, 1995, and by unreasonably barring Audio Odyssey as tenant from regaining possession of the premises for the following six weeks. To put these issues in sharper focus, the following is a brief chronology of this time period:

July 14: Brenton Bank commences replevin action in state court, obtains writ of replevin, and delivers the writ to Sergeant Barton at the Sheriff's office. Deputy Norris serves the writ, and the Audio Odyssey store is closed. Norris posts "no trespassing" signs, and a locksmith hired by the Bank changes the locks.

July 17: Deputy Norris meets with Bank representatives at the store. Store employees retrieve personal possessions not subject to the writ. Norris and the Bank agree to inventory the personal property in the store on Wednesday, July 19.

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July 19: Inventory begun and completed. Deputy Norris delivers keys and the completed inventory list to the Bank and quits the premises, without removing the "no trespassing" signs.

July 26: Audio Odyssey demands that the Bank either allow time to arrange a sale of the business, or reinstate Audio Odyssey on the premises with a working capital loan and a public apology.

August 2: Audio Odyssey sends a certified letter to the Rock County Sheriff demanding that he "surrender possession" of the store premises.

August 4: Audio Odyssey files motion to dismiss the replevin action.

August 11: Hearing on the motion to dismiss.

August 16: State court denies motion to dismiss. Another Audio Odyssey creditor obtains a writ of replevin and removes Sony products from the store pursuant to its purchase money security interest.

August 17: When notified Audio Odyssey's motion to dismiss had been denied, the Bank arranges to remove its collateral.

August 25: Bank removes the collateral and places it in storage.

August 31: Trial of the replevin action is delayed indefinitely. State court orders that Audio Odyssey may regain access to the premises and remove the "no trespassing" signs.

October 12: Landlord bills Brenton Bank for unpaid rent from July 14 to August 31. (Bank later pays more than $3500.)

A. Was the Initial Seizure Constitutionally Reasonable? The writ of replevin directed the sheriff to seize "[a]ll inventory, fixtures, accounts, furniture, equipment and machinery on property described as follows: [the legal description of the Audio Odyssey store premises]." Sergeant Barton and Deputy Norris testified that they thought this authorized seizure of the store premises. They were mistaken in that regard, though I do not share the court's view that deputy sheriffs who fail to parse a state court order with the legal acumen of lawyers and federal judges thereby lose the benefit of qualified immunity. *See, e.g., Saucier v. Katz*, 121 S. Ct. 2151, 2158-59 (2001). But I put qualified immunity aside, because the merits of the Fourth Amendment issue are more important. It is clear that the sheriffs' faulty interpretation of the writ of replevin is not dispositive — the Fourth Amendment issue turns on the objective reasonableness of their conduct, not on their subjective intent. *See Whren v. United States*, 517 U.S. 806, 814 (1996). In my view, there are two distinct reasons why the initial seizure was objectively reasonable.

Appendix A

1. The writ authorized immediate seizure of substantially all the personal property located in the store premises. To execute the writ, the personal property found in the store needed to be inventoried to determine what was subject to seizure. That process takes time. Because removal of all the personalty covered by the writ would obviously have left the store inoperable until Audio Odyssey could acquire new "inventory, fixtures, accounts, furniture, equipment and machinery," it was constitutionally reasonable for the sheriffs to construe the writ as authorizing them to close the store for a reasonable period while the replevied property was inventoried and removed.

The writ was served late on a Friday afternoon. Brenton Bank wanted to move quickly because Audio Odyssey had scheduled a major sale the next day, which would doubtless dispose of a portion of the Bank's inventory collateral. The court criticizes the sheriffs for acceding to a "zealous creditor's" demands. 245 F.3d at 738. But the law requires a sheriff to act decisively when a creditor has obtained a court order enforcing a drastic legal remedy such as replevin, a remedy that is available to protect the rights of secured creditors. Perhaps Brenton Bank acted unreasonably as a creditor. That is a matter between Audio Odyssey and the Bank governed by state law, not § 1983. In this type of situation, the Fourth Amendment is rarely implicated. *See Soldal v. Cook County*, 506 U.S. 56, 71-72 (1992).

2. In 1991, as a condition to obtaining a loan from Brenton Bank guaranteed by the Small Business Administration, Audio Odyssey signed a document entitled Assignment of Real Estate Lease and Agreement, on a form prescribed by the SBA, which provided in relevant part:

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4. In the event of any default by Borrower [Audio Odyssey] in the performance of any of the obligations of [its] note to Assignee [the Bank] evidencing the aforesaid loan, any renewal or extension thereof, or any other agreement made in connection therewith, including [its] agreements herein, then, Assignee, at its option, may, without notice, using such force as may be necessary, enter said leased premises and do any one or more of the following:

a. Remove all property of Borrower therefrom that is hypothecated as collateral for its aforementioned loan.

b. Sell the property referred to in paragraph a. on said premises.

c. Transfer and assign said lease and Borrower's rights therein to parties satisfactory to Assignee. . . .

Under Iowa law, "[w]hen one accepts the assignment of a lease. . . . [h]e stands in the shoes of the lessee at least for the period of time he occupies the premises." *Berg v. Ridgway*, 140 N.W.2d 95, 99 (Iowa 1966); *accord Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.*, 579 N.W.2d 823, 833-34 (Iowa 1998). Therefore, the lease assignment forecloses Audio Odyssey's claim that the initial entry violated its Fourth Amendment rights — because the Bank as assignee had the right to take possession of the leased premises "using such force as may be necessary," the deputy sheriffs acted in an objectively reasonable manner in helping the Bank take

possession peaceably, at least for the purpose of removing its collateral.[2]

Audio Odyssey argues that the Assignment of Real Estate Lease was invalid because the store's landlord never signed it. I disagree. In general, "an express restriction against an assignment does not render an assignment void as between the lessee and the assignee, and as between such parties it is still effectual to carry the interest of the lessee." 49 Am. Jur. 2d *Landlord & Tenant* § 1110 (1995). That principle should certainly apply here, because Audio Odyssey's promise to assign the lease in the event of default was a precondition to obtaining the bank loan and SBA guarantee. Moreover, a landlord who is entitled to reject a lease assignment waives that right and consents to the assignment if he does not object promptly. *See* Restatement (Second) of Property: Landlord & Tenant § 15.2 cmt. f (1977). Here, the store's landlord knew no later than July 24 that the Bank had taken possession. Rather than object, the landlord billed the Bank for unpaid rent in October, consistent with a waiver of any right to object.

B. Was the Seizure of the Store Unconstitutionally Extended? I agree with the court that the Fourth Amendment protects against a seizure which, though initially reasonable, is extended for an unreasonable period of time. Our *Terry* stop cases, for example, confirm that principle. But I do not agree the principle was violated.

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2. The Bank's attorney testified that he told a deputy sheriff about the lease assignment on July 14, before the writ was served, but did not present a copy of that agreement. It was objectively reasonable for the deputy sheriffs to accept that representation as establishing the Bank's right to take over the store premises.

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If the Assignment of Real Estate Lease gave Brenton Bank the right to possess the store premises after declaring a default, then the claim that the initial seizure was unconstitutionally extended necessarily fails. The point is not that Audio Odyssey lost its tenant's right of possession. The point is that the Assignment gave the Bank a competing right of possession that included, not only the removal of its collateral, but also the right to "[t]ransfer and assign said lease . . . to parties satisfactory to Assignee." In these circumstances, when Deputy Norris completed the task of supervising execution of the writ of replevin on July 19, it was not constitutionally unreasonable for him to deliver the keys to the premises to one of the parties entitled to possession.

But even ignoring the Assignment of Real Estate Lease, so that the initial seizure of the store premises may only be upheld as a reasonable temporary measure to permit inventory and removal of the replevied personal property, I conclude that on the facts of this case the deputy sheriffs did not violate the Fourth Amendment by reason of the lengthy process which followed the initial seizure before Audio Odyssey regained possession of the store. Having protected employees and others with an interest in the personal property by conducting an inventory of the property found on the premises, Deputy Norris reasonably concluded on July 19 that the Sheriff's role in executing the writ of replevin was concluded. This court asserts that Audio Odyssey was denied its "unquestioned legal right . . . to enjoyment of the empty premises. . . . for an indefinite period, and for an unauthorized purpose." 245 F.3d at 738. But on July 19, every aspect of

that assertion was open to question. The store was not empty, the Bank asserted the right to continued possession (correctly, in my view, given the lease assignment), and Audio Odyssey had made no attempt to seek judicial relief. In these circumstances, I conclude Deputy Norris was objectively reasonable in surrendering keys to the store to the Bank, leaving the private parties and the state court to sort out remaining legal issues.

Once the deputy sheriffs had surrendered the keys and quit the premises, I simply cannot fathom how they could have had a Fourth Amendment duty to restore Audio Odyssey to possession of the store. The state court issued the writ of replevin and could have vacated the writ or issued an order allowing Audio Odyssey to regain possession of the store. Yet Audio Odyssey never asked the court for emergency relief granting it possession. Although Audio Odyssey belatedly wrote the Sheriff on August 2 demanding return of the premises, the state court was the proper authority to resolve any dispute over possession of the store premises. Not until August 4 — nineteen days after the initial seizure — did Audio Odyssey move the court to dismiss the Bank's replevin action. This lack of diligence is not surprising, because an empty store would have been of no immediate value to Audio Odyssey unless it had the financial ability to restock. Audio Odyssey's July 26 demand to the Bank strongly suggests that Audio Odyssey lacked the capital necessary to resume store operations on its own.

Appendix A

The Fourth Amendment question is whether the deputy sheriffs were objectively unreasonable in extending the duration of the replevin seizure. Audio Odyssey's failure to assert its non-obvious claim to renewed possession of the store premises is relevant in weighing whether the deputy sheriffs were responsible for unconstitutionally extending the seizure. On this record, I conclude the district court properly granted summary judgment dismissing this claim.

For the foregoing reasons, I would affirm the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED APRIL 6, 2001

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 00-1634

AUDIO ODYSSEY, LTD., an Iowa Corporation; DOGAN A. DINCER; ANN M. DINCER,

Plaintiffs/Appellants,

v.

BRENTON FIRST NATIONAL BANK, an Iowa Banking Corporation; MICHAEL M. BLADEL, Sheriff of Scott County, Iowa; JOHN M. NORRIS, Deputy Sheriff of Scott County, Iowa; CHARLES A. BARTON; JOHN C. BRADLEY; CHRIS A. PIEPER; ROGER HOFFMAN; MERCHANTS BONDING COMPANY, a Corporation, CORPORATION,

Defendants/Appellees.

AUDIO ODYSSEY, LTD., an Iowa Corporation; DOGAN A. DINCER; ANN M. DINCER,

Plaintiffs/Appellants,

v.

BERNARD J. HOFMANN; ANDERSON & NELSON, a Professional Corporation,

Defendants/Appellees.

Appendix B

Appeal from the United States District Court for the Southern District of Iowa

Submitted: January 10, 2001
Filed: April 6, 2001

Before LOKEN and BYE, Circuit Judges and SACHS[1], District Judge.

SACHS, District Judge.

In mid-July 1995, Brenton First National Bank obtained a writ of replevin for seizure of certain property of Audio Odyssey, Ltd., an electronics store in Davenport, Iowa. A sheriff's deputy executed the writ later that day, ordered a locksmith to change the locks at the store, and posted "No Trespassing" signs even though the writ called for the seizure of personal, rather than real, property. Audio Odyssey's president and sole shareholder, Dogan A. Dincer, could not (or did not) enter the premises for several weeks, and the store went out of business. Seeking redress for the writ's *ex parte* issuance and mishandled execution, Audio Odyssey, Dincer, and Dincer's wife brought a variety of claims under 42 U.S.C. § 1983 and state law against the Bank, the Bank's attorney and law firm, the Bank's bonding company, the county officials who aided the writ's execution, and a loan officer of the Small Business Administration. Plaintiffs now appeal from the district court's many adverse rulings. These include the dismissal of the Dincers' individual claims for lack of standing, the dismissal of the section 1983

1. The Honorable Howard F. Sachs, United States District Judge for the Western District of Missouri, sitting by designation.

claim against the SBA loan officer, and the grant of summary judgment to other defendants on all federal claims. We affirm in part, reverse in part, and remand for further proceedings.

I

We view the record in the light most favorable to plaintiffs. Dogan Dincer, previously an employee and minority shareholder of Audio Odyssey, purchased the business for $270,000 in 1991. The purchase was partially financed through a $200,000 loan from the Bank, and the SBA guaranteed 85 percent of the loan. Audio Odyssey, in turn, executed a "Business Security Agreement" giving the Bank a security interest in the store's accounts, general intangibles, contract rights, instruments, chattel paper, documents, inventory, machinery, equipment and fixtures. The Agreement required Audio Odyssey to perform its payment obligations under the note, and to take other steps such as maintaining insurance on the collateral and keeping current with all tax obligations. In the event of default, the Agreement allowed the Bank to accelerate the loan and to enter the store and take the collateral.

In the weeks preceding July 14, 1995, Bank personnel came to believe that Audio Odyssey was failing to perform its duties under the loan and Agreement, including the duty to make timely payments, to maintain insurance, and to pay taxes. On July 13, 1995, Dincer paid $6,983 to the Bank, and instructed the teller to apply the payment so as to satisfy the store's monthly obligation for June and July. The Bank instead applied the payment to a previous overdraft. The next morning, John C. Bradley, a commercial loan officer and vice

president at the Bank, hand-delivered a letter to Dincer stating that the Bank was accelerating the loan, and demanding payment of the remaining balance (some $127,000) within ten minutes. Dincer contacted his attorney and surmised that he could not raise the sum in such a short time. The attorney faxed a letter to the Bank at around noon, contending that Audio Odyssey was not in default.

The Bank was not persuaded, and it brought an *ex parte* replevin action later that afternoon. Attorney Bernard Hofmann filed a Petition in Replevin in the Iowa District Court for Scott County, contending, among other things, that (i) Audio Odyssey was delinquent in its loan payments and other obligations, (ii) the Bank was entitled to possession of the collateral under the Agreement, and (iii) immediate action was necessary because the collateral might be destroyed, concealed, moved, sold, or fraudulently transferred (Bank personnel had told Hofmann that an "annual sale" was scheduled for that weekend, and the petition was filed on a Friday). Along with the petition, Hofmann filed a "Bond for Replevin" in the amount of $300,000, or more than twice the value of the collateral. The judge asked Hofmann whether the state's replevin statute required notice to the defendant, and Hofmann advised that the court had discretion to give such "notice and opportunity for hearing as it may prescribe" under Iowa Code § 643.5. Hofmann also explained that the Bank's collateral was in danger of being sold. The judge reviewed the statutory framework, considered the matter very briefly, and signed the order that Hofmann had drafted. Pursuant to the order, the clerk of the court issued a writ of replevin directing the sheriff to deliver the following property to the Bank's possession:

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All inventory, fixtures, accounts, furniture, equipment and machinery on property described as follows:

> 4500 square feet located at 1718 E. Kimberly Road, Davenport, Iowa, legally described as: Part of the Northwest Quarter of the Southwest Quarter of Section 18, Township 78, Range 4, East of the 5th P.M. . . . to the City of Davenport, Scott County, Iowa.

Armed with the writ and order, Hofmann visited the Scott County Sheriff's Department and requested that the writ be served immediately. Sergeant Charles A. Barton reviewed the writ and asked Hofmann if the Bank was prepared with moving trucks to remove the collateral, as is customary. Hofmann said that the Bank did not have moving trucks immediately available. Sergeant Barton explained that the Department could not serve the writ because it was already late in the afternoon and the Bank did not have moving trucks. Hofmann called Bradley at the Bank for instructions, and Bradley told him that the Bank's intention was to change the locks and keep Dincer and other store personnel off the premises. Hofmann relayed this information to Sergeant Barton, insisted that the writ be executed that afternoon, and asked whether the Sheriff's Department could lock the premises over the weekend to prevent Audio Odyssey from selling the collateral. Sergeant Barton, in turn, reviewed the writ and said that it would be possible to lock the store. At Sergeant Barton's request, Hofmann completed a form

entitled "Directions to Sheriff,"[2] which stated that Bradley and a locksmith would meet the deputies at Audio Odyssey.

Deputy John M. Norris served the writ of replevin at Audio Odyssey at 4 p.m. He met Bradley and the locksmith at the premises, and ordered everyone inside to leave the store. Deputy Norris thereafter directed the locksmith to change the locks, secured the inventory and other collateral, and posted "No Trespassing" signs on the front and back doors. During the next week, Deputy Norris and others completed an inventory of the items described by the writ, removed the items, and turned them over to the Bank (along with keys to the premises).[3]

In the meantime, Dincer tried to regain access to the premises — albeit somewhat circuitously. He called the judge at home the night that Deputy Norris served the writ, and the judge advised him to employ an attorney. Dincer and Audio Odyssey retained their present counsel the next Monday. Meetings on July 26 and August 4 between attorneys for Audio Odyssey and the Bank were unfruitful. On August 2, 1995, plaintiffs' attorney wrote a certified letter to the Scott County Sheriff and demanded the immediate surrender of the premises. The letter went unanswered; it is unclear who

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2. Under the Sheriff's Department's policy, a deputy reads the writ of replevin along with the "Directions to Sheriff" in order to understand what the plaintiff wants. If the directions conflict with the order and writ, the court documents control.

3. None of the parties contends that there were fixtures involved; that is, improvements of value belonging to Audio Odyssey and affixed to the premises.

may have received and reviewed it. Two days later, Audio Odyssey moved to dismiss the replevin action, requested an order directing the sheriff to return the real estate, and filed a jury demand. There was no record of a request for expedited handling, and no evidentiary hearing until August 22, 1995. That hearing was continued and never completed. On August 31, 1995, some six weeks after Deputy Norris executed the writ, a court order allowed Audio Odyssey to enter the premises and remove the "No Trespassing" signs. Dincer elected not to re-open the business, surmising that its goodwill and commercial relationships had been destroyed. Ultimately, the state court did not reach a judgment in the replevin action. It dismissed the case without prejudice at the Bank's urging in September 1999 — or more than two years after the federal litigation commenced.

In their lawsuit, plaintiffs essentially alleged that Deputy Norris, Sergeant Barton and the private defendants committed an unreasonable seizure of Audio Odyssey's real property by changing the locks and erecting "No Trespassing" signs without a court order authorizing such measures, and that the defendants deprived, and conspired to deprive, plaintiffs of personal property without due process of law, by use of an unconstitutional replevin statute. The district court dismissed the federal claim against the SBA loan officer, and dismissed the Dincers' claims for lack of standing. It later (i) granted summary judgment to the county officials (among other things, finding no violation of plaintiffs' constitutional rights, and alternatively, granting qualified immunity to the relevant officials), (ii) held that the Iowa replevin statute comported with the requirements of due process, and (iii) rejected the conspiracy claims against the Bank and others, having

rejected the underlying claims of constitutional injury. The court dismissed some of the pendent claims on the merits, while dismissing others without prejudice to refiling in state court. It entered a final judgment consolidating the various rulings on January 25, 2000, and plaintiffs timely appealed.

II

As a threshold matter, we hold that the Dincers lack individual standing to sue defendants for the replevin. It is well established that a shareholder or officer of a corporation cannot recover for legal injuries suffered by the corporation. *See Heart of America Grain Inspection Serv., Inc. v. Missouri Dep't of Agric.*, 123 F.3d 1098, 1102 (8th Cir. 1997); *Chance Mgmt., Inc. v. South Dakota*, 97 F.3d 1107, 1115-16 (8th Cir. 1996). The rule applies even to a corporation's sole shareholder. *See Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311, 1317 (4th Cir. 1994). Here, it was Audio Odyssey whose premises and personal property were taken, rightfully or not. Any constitutional violations presented by this case were visited upon Audio Odyssey, and any injuries to the Dincers occurred solely because of their relationship with Audio Odyssey.

It is true that the "shareholder standing rule" does not apply when the alleged injury is distinct from that suffered by the corporation or other shareholders. *See, e.g., Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1318 (9th Cir. 1989). The Dincers seek redress for various emotional and reputational injuries stemming from the replevin of the Bank's collateral and the seizure of the premises, including the loss of business relationships with customers and

suppliers. We do not think these injuries are "distinct" from the corporation's. A "distinct" injury is one in which the *claimant's* rights have been violated, not merely one in which the claimant is indirectly harmed because of one party's injury to another. *See, e.g., Gersman v. Group Health Ass'n*, 725 F.Supp. 573, 577-78 (D.D.C. 1989) (holding that a Jewish president and principal shareholder of company could not maintain suit under 42 U.S.C. § 1981 against insurer charged with discriminatorily terminating contract with company), *aff'd in relevant part*, 931 F.2d 1565, 1567 (D.C. Cir. 1991), *vacated on other grounds*, 502 U.S. 1068 (1992). The premises and replevined items belonged to the corporation, not the Dincers. Doubtless a sole shareholder may suffer shame and humiliation when the corporation is destroyed, but an "emotional injury" exception would swallow the rule against shareholder standing. The district court correctly dismissed the individual claims.

III

We also agree with the district court's grant of summary judgment on the federal claims regarding Audio Odyssey's personal property. Audio Odyssey maintains that the Iowa replevin statute, Iowa Code §§ 643.1-643.22 (1999), is unconstitutional because it deprives debtors of property without due process of law. As best we can surmise, Audio Odyssey challenges the statute facially and as applied by the defendants and the state court. We reject both challenges.

Appendix B

A

A number of Supreme Court cases have examined whether various state property seizure schemes comport with due process. In *Fuentes v. Shevin*, 407 U.S. 67 (1972), for example, the Court invalidated Florida and Pennsylvania statutes that permitted an *ex parte* replevin upon bare conclusory allegations by the creditor and the creditor's posting of a bond, allowed the clerk of court to issue the writ without meaningful judicial oversight, and permitted the defendant to regain its property only by posting a bond or, in Pennsylvania, by initiating a separate lawsuit. *See id.* at 73-78. *Fuentes* held that in the absence of "extraordinary situations," a debtor could not be deprived of a significant property interest unless provided with notice and a pre-deprivation opportunity to contest the creditor's claim. *Id.* at 90. The Court refined and perhaps narrowed this holding two years later. *See Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). *Mitchell* upheld a Louisiana sequestration statute that did not provide for prior notice to the debtor and a prior hearing, in light of other procedural safeguards that, on balance, satisfied due process and permissibly accommodated the competing property interests of debtors and creditors. *See id.* at 608-10. Specifically, the Louisiana statute required a factually detailed affidavit explaining the debtor's delinquency, the posting of a bond, an immediate post-deprivation hearing, and judicial supervision of the entire process; the debtor could regain the property by posting a bond, and the creditor remained potentially liable for wrongful attachment. *See id.*

Appendix B

The Court invalidated a Georgia garnishment statute the next year. *See North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975). The statute in question allowed a writ of garnishment to issue by a court clerk without judicial participation in the process and upon a conclusory affidavit; the statute did not provide for a prompt hearing, and the debtor could not challenge the garnishment without posting a bond. *See id.* at 606-08.

On the basis of *Fuentes* and subsequent authorities, our Court attempted to distill "five primary factors" that must be evaluated in considering a replevin or attachment scheme's constitutionality in the absence of prior notice and a pre-deprivation hearing. *Watertown Equip. Co. v. Norwest Bank Watertown, N.A.*, 830 F.2d 1487, 1491 (8th Cir. 1987).[4] These include:

> (1) an affidavit accompanying the petition for the writ of attachment which contains facts alleged by a person with knowledge; (2) an opportunity for the debtor to dissolve the writ by posting a bond; (3) an "early" post-deprivation hearing at which the creditor bears the burden of proving

4. We believe the *Watertown* elements remain sound despite *Connecticut v. Doehr*, 501 U.S. 1 (1991), and *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), at least in the personal property context, and when, as here, the dispute is between a creditor and debtor rather than a plaintiff and defendant in tort. *See Doehr*, 501 U.S. at 17 ("[D]isputes between debtors and creditors more readily lend themselves to accurate *ex parte* assessments of the merits. Tort actions, like the assault and battery claim at issue here, do not.").

> the legality of the writ of attachment; (4) indemnification of the debtor for a wrongful attachment; and (5) judicial supervision of the attachment process.

Id.; *see also Lewis Service Center v. Mack Financial Corp.*, 696 F.2d 66, 68 (8th Cir. 1982). As *Watertown* noted, however, there is no easy formula to follow, because due process requirements are not "technical," and the creditor remedy scheme must be evaluated "as a whole." 830 F.2d at 1490 (quoting *Mitchell*).[5]

B

We believe that Iowa's statute satisfies the *Watertown* evaluation. First, the statute adequately (perhaps generously) indemnifies the debtor in the event of a wrongful taking. Section 643.7 requires the creditor to post a bond of at least "twice the value of the property sought to be taken." Iowa Code § 643.7. The aggrieved debtor may seek a judgment on the creditor's bond, or request that a jury "assess the value of the property and the damages for the taking or detention thereof."[6] *See* Iowa Code §§ 643.16, 643.17, 643.20. By contrast, the defective statute in *Watertown* limited the

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5. *Watertown* turned on gross deficiencies in the fourth and fifth factors listed above.

6. Such damages may exceed the value of the property. *See Universal C.I.T. Credit Corp. v. Jones*, 227 N.W.2d 473, 479-80 (Iowa 1975); *see also* Iowa Code § 643.17 (stating that judgment "shall also award such damages to either party as the party may be entitled to for the illegal detention [of the property]").

creditor's bond to $10,000, while the property seized was worth over $275,000. *See Watertown*, 830 F.2d at 1494. Damages were unavailable under the statute or common law absent a showing of malice or lack of probable cause. *See id.* Iowa's replevin statute differs from the one we invalidated in *Watertown* in that it protects the debtor against losses from wrongful replevins that may be reasonably foreseeable. The damages to Audio Odyssey could conceivably exceed the bond, but that hardly relates to the *ex parte* nature of the proceeding. In any event, it is Iowa replevin practice in general that is in question here, not the more bizarre circumstances and events surrounding the *execution* of this particular writ of replevin.

Second, the debtor may routinely regain the taken property by posting a bond of its own. *See* Iowa Code § 643.12. Audio Odyssey insists that such a right terminates once the officer transfers the property to the creditor. Even so, the collateral in this case was not transferred to the Bank until some five days after Deputy Norris executed the writ. We conclude that a counter-bond could have been timely posted even under Audio Odyssey's reading of the statute.[7]

Third, the statute provides adequate judicial supervision of the replevin process. A clerk may issue a writ of replevin only "upon direction of the court after notice and opportunity for such hearing as [the court] may prescribe." Iowa Code § 643.5. The replevin suit is governed by "ordinary proceedings" and presumptively ends in a judgment that one party or the

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7. We confess some skepticism about the financial ability of Audio Odyssey to post a large bond, but theoretical ability is all that *Watertown* contemplates.

other is entitled to possess the property in question, with or without an award of damages. Iowa Code §§ 643.2, 643.17. These features distinguish Iowa's statute from the ones stricken in *Watertown* and *Fuentes*, which permitted a clerk to issue a writ on his or her own. *See Watertown*, 830 F.2d at 1492; *Fuentes*, 407 U.S. at 74.

Fourth, we discount Audio Odyssey's argument that the statute makes no allowance for a prompt post-deprivation hearing. Iowa Code § 643.2 provides that a replevin action shall be tried "by ordinary proceedings." We agree with the defendants and the district court that the term "ordinary proceedings" incorporates general motion practice under state law, specifically, Iowa Rule of Civil Procedure 100. We see nothing in the statute to prevent a replevin defendant from filing a post-deprivation motion to dismiss under Rule 100 (or a motion to vacate the writ of replevin) and requesting a very prompt hearing from the court. In this case the judge was immediately available by telephone, and would presumably have been procedurally accommodating if plaintiff had an attorney prepared to deal with the matter.

The statute does specifically preclude defendants from asserting counterclaims and joining "any cause of action not of the same kind." Iowa Code § 643.2. By negative implication, then, it would not preclude a request for a prompt hearing in support of a defense to a replevin suit. *Cf. Guzman v. Western State Bank*, 516 F.2d 125, 131 (8th Cir. 1975) (invalidating North Dakota attachment scheme, which required debtor to post a bond in order to obtain a post-seizure hearing). Indeed, the state court did permit Audio Odyssey to seek a "post-deprivation hearing" to address whether "the method by which the Replevin Order was and has been

enforced was incorrect" — the very sort of hearing that is now asserted to be statutorily forbidden.

We do not believe that the statutory provision for a prompt hearing must be explicit. *See Watertown*, 830 F.2d at 1492 ("The South Dakota statute *can be interpreted* as having provided for an immediate hearing.") (emphasis added). The Iowa statute does not expressly provide for a hearing, much less a prompt one. Yet, the statute is no different in this regard from the one upheld by the Supreme Court in *Mitchell*.[8] There, the Louisiana statute provided that "The defendant by contradictory motion may obtain the dissolution of a writ of attachment or of sequestration, unless the plaintiff proves the grounds upon which the writ was issued." La. Code Civ. Proc.Art. 3506 (unchanged since 1961). In upholding the statute, the Supreme Court observed that the debtor "was not left in limbo to await a hearing that might or might not eventually occur [as in *Fuentes*]. Louisiana law expressly provides for an immediate hearing and dissolution of the writ 'unless the plaintiff proves the grounds upon which the writ was issued.' " *Mitchell*, 416 U.S. at 618.[9] Just as a Louisiana creditor must "prove the grounds upon which the writ was issued," Iowa's statute places the burden of proof

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8. *See also Watertown*, 830 F.2d at 1491 ("Although the statute did not specify when a hearing must occur, its language was, in essence, no different on this point from the Louisiana sequestration statute which in *Mitchell*, the Supreme Court said provided for an immediate post-deprivation hearing.").

9. The Court's interpretation of Louisiana's statute is noticeably generous, but we will adhere to "the principle that courts are to adopt constructions of statutes that avoid grave and doubtful constitutional questions." *United States v. Rea*, 223 F.3d 741, 744 (8th Cir. 2000).

upon the creditor throughout the proceedings. *See Wilson v. Findley*, 275 N.W. 47, 56 (1937).

Although the wording of Iowa's procedural plan might well be improved by fine-tuning, the worst that might be said of it is that a particular debtor might fail to persuade a particular judge to hold a prompt hearing, notwithstanding constitutional requirements. But this possibility does not render the statute invalid *on its face.* A statute should not be stricken based upon a "worst case" scenario that "may never occur." *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 512 (1990). Nor is the statute unconstitutional as applied. It allows for a prompt post-deprivation hearing, but Audio Odyssey did not seek one.[10] Audio Odyssey, then, had a meaningful *opportunity* to be heard. *See Hroch v. City of Omaha*, 4 F.3d 693, 696 (8th Cir. 1993). Its failure to seize that opportunity is not a denial of due process. *See Marler v. Missouri State Bd. of Optometry*, 102 F.3d 1453, 1456-57 (8th Cir. 1996).[11]

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10. The somewhat leisurely activity suggests that Audio Odyssey was already fatally damaged when the sale was stopped — if not before — but that remains subject to proof on remand.

11. It could even be argued that Audio Odyssey waived its due process attack by not timely resorting to the available procedures that it now claims are inadequate — even if its attorneys did not realize that an immediate hearing could be requested and provided. *See Krentz v. Robertson Fire Protection Dist.*, 228 F.3d 897, 904-05 (8th Cir. 2000) (holding that plaintiff waived claim that termination violated due process, where plaintiff (a) forewent administrative remedies held by the court to be available under state law, and (b) "could have ascertained the applicability [of state administrative law] from a reading of the statutes and pertinent cases"); *Hroch*, 4 F.3d at 696 (holding that party waived argument against adequacy of pre-deprivation remedies that he forewent).

Fifth and finally, the Iowa statute sufficiently requires a plaintiff to substantiate the legal basis for obtaining an *ex parte* replevin, and we conclude that as a practical matter there was constitutionally adequate compliance — the essential message reached the judge. The *Watertown* framework speaks of "an affidavit accompanying the petition for the writ of attachment which contains facts alleged by a person with knowledge." 830 F.2d at 1491. Absent advance notice and a hearing, due process requires that the creditor explain not only the debtor's delinquency, but also the exigent circumstances that justify a summary deprivation. *See Guzman*, 516 F.2d at 130 ("In the absence of an assertion in the affidavit that the creditor believes that the property will be concealed, disposed of, or destroyed and the creditor's interest therein lost or defeated, we do not believe that the *ex parte* issuance of the warrant of attachment is justified. . . . If such an emergency situation does not exist, the creditor's interest in the property probably will not be impaired by a short delay to provide notice and a hearing to the debtor.").

We discern no infirmity in the Iowa statute as written. Iowa Code § 643.1 requires a verified petition (functionally equivalent to an affidavit), specifying "[t]he facts constituting the plaintiff's right to the present possession thereof, and the extent of the plaintiff's interest in the property." At the very least, this language would require a creditor to specify the nature and extent of the debt owing, the nature of any delinquency, and the extent of the creditor's security interest. *Cf. Fuentes*, 407 U.S. at 74 ("Florida law automatically relies on the bare assertion of the party seeking the writ that he is entitled to one . . ."). The statute does not expressly require the creditor to specify the exigent circum-

stances justifying an *ex parte* proceeding, but that is not fatal. For one thing, the statute could readily be so construed. Exigency would be among "the facts constituting the plaintiff's right to the present possession," given the defendant's due process right to continued possession in the absence of exigent circumstances. *See Guzman*, 516 F.2d at 130. For another, the court has discretion to provide advance notice and a hearing when the circumstances are *not* exigent. *See* Iowa Code § 643.5 (providing that writ may issue "upon direction of the court after notice and opportunity for such hearing as it may prescribe"). It appears from the record that the state court judge in this case considered doing just that, then relented after the Bank's attorney explained the danger that the collateral would be sold. The statute, then, is not facially unconstitutional on this basis.[12]

Nor are we greatly troubled by the replevin petition in this case. The Bank offered considerably more than a "bare assertion," *see Fuentes*, 407 U.S. at 74, that it was entitled to the collateral. The petition described and attached the note of $200,000 that Audio Odyssey had executed, explained Audio Odyssey's obligations under the note, described and attached the Business Security Agreement and the extent of the Bank's security interest, and, correctly or otherwise, specified various alleged delinquencies including $6,233.63 in monthly installments, failing to insure the collateral, failing to pay state payroll and sales taxes, and failing to provide

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12. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully[.]" *United States v. Salerno*, 481 U.S. 739, 745 (1987). Subject to certain exceptions not here relevant, "[T]he challenger must establish that no set of circumstances exists under which the Act would be valid." *Id.*

the Bank with certain business records. Moreover, the petition explained the need for immediate action. Among other things, the Bank alleged that "harm . . . will result from the sale, transfer or assignment of the disputed property to the extent [that] such sale, transfer or assignment is fraudulent or in derogation of the plaintiff's rights in such property." We need not rule that such boilerplate language is adequate by itself, because attorney Hofmann explained to the judge his specific concern that "collateral in which [the Bank] had a security interest in was in danger of being sold with the proceeds not going to satisfy their — the debts that were owed to them." The Bank knew that Audio Odyssey was planning an "annual sale" the following day, and that much or all of the collateral was in danger of being sold. Hofmann's oral statement adequately apprised the judge of this exigent circumstance.[13]

The only noticeable failing is that the petition was verified by the Bank's attorney rather than "a person with knowledge." *See Watertown*, 830 F.2d at 1491. This defect alone does not create a viable due process claim. Attorney Hofmann drafted the petition in reliance on what his client told him. There is no indication that a petition executed by a Bank official would have been narrower in scope or otherwise different from Hofmann's, or that such a petition would not have recited the allegations essential to the Bank's replevin claim (the debt, the security interest, the delinquencies, and the exigency). The Bank's books apparently did reflect a deficiency, although plaintiff claims a deposit was misapplied.

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13. Since the proceedings were *ex parte*, and the question is whether a creditor has adequately explained to the court why a writ of replevin should issue, the fact that there was an oral showing rather than a written one is not constitutionally significant.

Without *some* plausible showing that a properly verified petition would have made a difference, we cannot say that its absence violated due process under these particular facts. *See id.* ("[T]he necessary procedural safeguards in a given case are determined by comparing the extent to which they further the defendant's interest in avoiding a wrongful or arbitrary deprivation of his property with their negative effect upon the interest of the state in providing protective creditor remedies."). More importantly, it must be emphasized that due process does not require any "particular form of procedure." *Mitchell*, 416 U.S. at 610 (citation omitted). Rather, the question is whether the protections afforded Audio Odyssey (and other replevin defendants in Iowa) are sufficient on balance, i.e., whether the statute "as a whole" constitutionally accommodates the property interests of debtors and creditors. *Id.* We hold that it does, both in general and in this case. Considering Audio Odyssey's ability to obtain a prompt post-deprivation hearing, its adequate indemnification under the statute, its ability to regain the property by posting its own bond, and the Bank's detailed allegations (albeit through an attorney) that Audio Odyssey was delinquent under the note and was planning to sell the collateral, we are satisfied that any harm occasioned by the improperly verified petition was no more than "slight" in comparison to the statute's "substantial advancement of the state interest in protecting a creditor from a dissipation of collateral." *Watertown*, 830 F.2d at 1491.

We thus agree with the district court and with a summary statement by the Iowa Supreme Court, sustaining the constitutionality of the replevin statute. *See Interfirst Bank of Dallas v. Hanson*, 395 N.W.2d 857, 860 (Iowa 1986).

We also agree with the district court that due process was observed in the seizure of the personal property in question. It may be, of course, that the Bank had no sound factual and legal basis for seeking replevin, which is a matter we do not decide. That will presumably be litigated in state or federal courtin connection with a damage claim on the bond.

We have no need to approve the initial state court decision to issue an *ex parte* order having the effect of stopping Audio Odyssey's "annual sale." Even if we might suppose that discretion was poorly exercised, and that too much weight may have been given to the assumed risk of the collateral's loss in the event of notice to the debtor, what is involved in this portion of the case is the ordinary risk of judicial error, not a substantial constitutional question of due process.

IV

The judicially unauthorized lockout of Audio Odyssey's real property is a more troubling federal question, although perhaps less damaging.[14] We must determine whether there is a triable claim that Sergeant Barton and Deputy Norris committed a constitutionally unreasonable seizure of the real property, whether the officers are entitled to qualified immunity, and whether the Bank and its attorneys conspired with the officers to violate Audio Odyssey's Fourth Amendment rights (and whether *they* might prevail under some notion of "good faith" immunity). For the reasons set forth below, we reverse the grant of summary judgment on these claims.

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14. Whether plaintiff's six week exclusion from the empty shell of its store was seriously damaging remains to be determined.

Appendix B

A

The Fourth Amendment prohibits unreasonable searches and seizures by law enforcement officers, whether of a person or property. *See Gardner v. Buerger*, 82 F.3d 248, 251 (8th Cir. 1996). A "seizure" of property occurs whenever "there is some meaningful interference with an individual's possessory interests in that property." *Soldal v. Cook County*, 506 U.S. 56, 61 (1992) (citation omitted). We believe the officers seized Audio Odyssey's premises by entering the store, ordering those inside to leave, arranging for the locks to be changed, and erecting "No Trespassing" signs, thereby excluding the company's principals from the store's property. Such an exclusion from one's property, even for a rather brief period, is "meaningful interference" as a matter of law.

Somewhat less obvious is whether the seizure was objectively unreasonable. A seizure of property that is unsupported by a warrant or other court order is presumptively unreasonable within the meaning of the Fourth Amendment. *See, e.g., id.* at 68-69. The order and writ of replevin relied upon by Sergeant Barton and Deputy Norris did not authorize a seizure of Audio Odyssey's real property. Rather, it directed the officers to seize various enumerated types of personal property located at a specific address. Although the writ and order listed a legal address, they did so only to describe the location of the items to be seized, specifically, "All inventory, fixtures, accounts, furniture, equipment and machinery *on property described as follows* [followed by legal description]." This language cannot reasonably be read to authorize a seizure of the electronics store — particularly in the context of a writ of replevin, which, time out of mind,

has authorized the seizure of personal rather than real property.[15] Presumably an officer may briefly secure real property for minutes or hours while seizing personal property located thereon, in order to maintain the peace or even to prevent customers or employees from absconding with the collateral. *Compare Illinois v. McArthur*, __ U.S. __, 121 S. Ct. 946 (2001) (permitting temporary seizure of homeowner while officers obtained search warrant).[16] But erecting (and failing to remove) "No Trespassing" signs, changing the locks, and giving the keys to the Bank far exceeded the scope of any temporary seizure that might be justified. Defendants do not even argue that the replevin writ and order, fairly construed, conferred a right to seize the real estate for the several days required to conduct an inventory and arrange for the removal of personal property. They do contend, however, that they acted reasonably.

Defendants' reliance upon *Johnson v. Outboard Marine Corp.*, 172 F.3d 531 (8th Cir. 1999), is misplaced. There, we held that an erroneous seizure of personal property is not necessarily an "unreasonable" one, and that the officer in that case had a reasonable basis for seizing a boat and trailer that fell outside of a writ of execution. *Johnson* did not

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15. Interestingly, a civil procedure manual kept by the Sheriff's Department defines "replevin" as "the redelivery to the owner the possession of *personal property* which is his and which is wrongfully detained from him and to which he has a right to immediate possession" (emphasis added).

16. We also assume there is an adequate law enforcement reason for seizing real property for a fairly long time to secure a crime scene, but here we are dealing with a routine civil proceeding.

purport to immunize all errant seizures; rather, the question is whether the officer's mistake is objectively reasonable. *See id.* at 536-37; *Dawkins v. Graham*, 50 F.3d 532, 534 (8th Cir. 1995) ("[T]he Fourth Amendment's allowance for officers' honest mistakes is limited to mistakes that are objectively reasonable."). That is the same question we ask today. Our answer differs from that reached in *Johnson* because the facts of the two cases stand in sharp contrast. The writ of execution in *Johnson* authorized the seizure of "any and all personal property of the judgment debtor (a dissolved corporation) located at" the address of the corporation's secretary. While executing the writ, an officer seized a boat and trailer that were later discovered to be the property of the corporation's secretary and president rather than the corporation itself. Various circumstances not here present made the officer's decision reasonable:

— The boat and trailer were not identifiable as property of one entity or another, and were the same sort of property handled by the judgment debtor in the course of its business.

— The officer had been told by a superior that, even if the property were not the corporation's, the secretary of the corporation was not protected under state law from an execution to satisfy a judgment against the corporation. We tacitly accepted that as authorization similar to legal advice.

— The officer confronted the secretary when seizing the boat, and the secretary was unable to produce any documentation of ownership for the boat or trailer.

In short, the officer in *Johnson* relied upon specific facts creating a reasonable belief that the writ of execution authorized a seizure of the property at issue, while the officers in this case did not. An officer's mere recitation of a mistaken belief does not make the mistake "reasonable" as a matter of law, and we cannot agree that the seizure of Audio Odyssey's real property was "reasonable" under the Fourth Amendment.[17]

B

The more challenging question is whether the officers are entitled to qualified immunity. "In resolving a case in which the defense of qualified immunity has been raised, this Court must determine whether the appellees asserted a violation of a federal right, whether that right was clearly established, and whether a reasonable official in [the defendant's] position would have known that his conduct violated that right." *Walden v. Carmack*, 156 F.3d 861, 868-69 (8th Cir. 1998). We believe not only that Audio Odyssey has demonstrated a violation of a constitutional right, but that the right in question is well established, namely, the Fourth Amendment's protection against seizure of one's property in the absence of a warrant, an equivalent court order, or circumstances justifying a recognized exception to the warrant requirement.

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17. As Deputy Norris's superior, Sergeant Barton is potentially liable as a supervisor as well as individually, since he "directly participated in the constitutional violation." *Otey v. Marshall*, 121 F.3d 1150, 1155 (8th Cir. 1997). We explain in Part V, however, that Sergeant Barton's *supervision* of Deputy Norris is not itself actionable. We also leave open the question of whether Deputy Norris could rely, for some of his conduct, on advice from a superior — as in *Johnson*.

See id. at 872 (upholding denial of qualified immunity, where officer allegedly seized items outside the boundaries of that described in search warrant and did not posit a reasonable belief that the items were located within such boundaries).

Finally, we examine whether a reasonable officer in Sergeant Barton or Deputy Norris's position would have known that the seizure at issue violated the right in question. The tests for Fourth Amendment legality and qualified immunity both use the term "reasonable," but the two questions are distinct. A seizure comports with the Fourth Amendment if it is objectively reasonable; one way for a seizure to be objectively reasonable is for the officer to have a reasonable belief that a court order allows the seizure. *See, e.g., Johnson*, 172 F.3d at 536-37. Qualified immunity, on the other hand, somewhat expands the leeway already afforded by the substantive Fourth Amendment law. It may not be useful to ask whether an officer's conduct is "reasonably reasonable," but we do examine the conduct more deferentially at the qualified immunity stage. An analogy might be drawn from the standard governing a qualified immunity defense to a charge that an arrest was lacking in probable cause; then, "the issue for immunity purposes is not probable cause in fact but arguable probable cause." *Habiger v. City of Fargo*, 80 F.3d 289, 295 (8th Cir. 1996).

Whatever measure of deference is due Sergeant Barton and Deputy Norris, it cannot immunize an error as significant as theirs. "Qualified immunity does not protect plain incompetence." *Dawkins v. Graham*, 50 F.3d 532, 535 (8th Cir. 1995) (affirming denial of qualified immunity to officers who, among other things, erroneously executed a search

warrant at 611 Adam Street rather than 611 Byrd Street); *Wooley v. City of Baton Rouge*, 211 F.3d 913, 926-27 (5th Cir. 2000) (holding that officers who delivered child from mother to grandparents under court order awarding temporary custody to grandparents were not entitled to qualified immunity, where the order did not direct officers to effect a transfer of custody, and state law required a separate civil warrant for such transfers); *Bins v. Artison*, 721 F.Supp. 1034, 1038 (E.D. Wis. 1989) (rejecting qualified immunity defense to due process claim and entering judgment for plaintiff, where officer seized plaintiff's racing car when executing judgment against other parties, without ascertaining car's owner), *vacated in part on other grounds*, Nos. 90-1149, 90-1339, 1991 WL 10625 (7th Cir. Feb. 4, 1991). The mere inclusion of Audio Odyssey's legal address within a writ and order requiring the seizure of various enumerated items on the premises does not colorably justify a seizure of the premises themselves — even if one ignores the legal distinction between real and personal property, the purpose of a replevin, and the distinct possibility that the officers did not even harbor the claimed reasonable belief on the day in question.[18] At the very least, a zealous creditor's request for measures clearly exceeding those authorized by

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18. If the officers truly believed that the writ and order allowed the Bank to seize the premises and use them to store the personal property, then it is unclear why moving trucks would be necessary to remove the personal property (and why Sergeant Barton asked attorney Hofmann if the Bank had arranged for such moving trucks). It is equally likely — and probably should be assumed on summary judgment — that the officers correctly understood the writ and order, but were persuaded by Hofmann and the Bank to carry out a seizure beyond the one authorized by the court.

the court should have given the officers pause, either to consider their actions more carefully or to seek disinterested legal advice from the county attorneys they regularly consult. "Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

We are aware that certain practical arguments can be asserted in favor of the real estate seizure. As the district judge and the dissent would have it, we also suppose that seizure of the premises may have been the "sensible" thing to do, at least while taking an inventory of the property. But to make this dispositive simply strong-arms away the unquestioned legal right of Audio Odyssey to enjoyment of the empty premises, however that may be valued at trial. It may be equally "sensible" to create a path across the vacant, unused land of another when needed, even though consent has not been given. But the right of expropriation and self-help is clearly limited. There was no reason to doubt that Audio Odyssey's legal right to its property was being invaded without judicial approval, for an indefinite period, and for an unauthorized purpose — be it to store and inventory the collateral, to effectuate the Bank's desire to possess the premises, or otherwise. We therefore reverse the grant of summary judgment to Sergeant Barton and Deputy Norris on the basis of qualified immunity.[19]

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19. The facts at trial may differ from those we have presented, but any reassessment of qualified immunity will ultimately be a question of law for the court. *See Buffkins v. City of Omaha*, 922 F.2d 465, 472 n.16 (8th Cir. 1990); *Garionis v. Newton*,

(Cont'd)

Appendix B

C

A further aspect of the case concerns the length of the wrongful seizure for which the officers and the other defendants are potentially liable. Audio Odyssey contends that the premises were seized for six weeks; Deputy Norris changed the locks and erected "No Trespassing" signs on July 14, 1995, and Dincer did not regain access to the premises until the court's order of August 31, 1995 — despite the certified letter sent to the Sheriff's Department and the meetings between attorneys from Audio Odyssey and the Bank, during which demands for the real estate were made. Audio Odyssey contends that defendants are liable for the entirety of the company's exclusion from the premises, as well as the foreseeable consequences of that exclusion — including the store's failure. Defendants insist that the plaintiffs should have more promptly sought a judicial remedy, and we agree that Audio Odyssey could have gone to court very quickly to seek immediate return of its real estate. In addition, defendants argue that plaintiffs could have posted a bond to have possession restored, and the record suggests that Audio Odyssey claims to have been financially able to do so.

The issues include whether the defendants proximately caused Audio Odyssey's extended injuries, and beyond that, whether the injuries are more fairly attributable to plaintiff's

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(Cont'd)

827 F.2d 306, 309 (8th Cir. 1987) (holding that district court erred by submitting the ultimate issue of qualified immunity to the jury). Qualified immunity is unavailable to the officers on the record before us as we have construed it.

failure to promptly mitigate damages. Those are jury questions. "Causation is generally a jury question unless, in a particular case, the question is so free from doubt as to justify taking it from the jury." *Ricketts v. City of Columbia*, 36 F.3d 775, 779 (8th Cir. 1994) (citation and quotation omitted). The possibility of an intervening cause does not generally defeat an inference of proximate cause as a matter of law. *See Trudeau v. Wyrick*, 713 F.2d 1360, 1367 (8th Cir. 1983). Here, the question of who caused the extended lockout is not free from doubt.[20]

D

We next consider the responsibility of various private defendants for seizing the real property. Recovery is available under section 1983 only for violations of federal rights committed by persons acting "under color of state law." Private conduct is actionable under section 1983 under two conditions. First, the constitutional deprivation at issue "must be caused by the exercise of some right or privilege created by the State . . ." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) (describing the right to seek a garnishment or attachment as qualifying). Second, the private party must have "acted together with or . . . obtained significant aid from state officials" or engaged in conduct

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20. Because of our reversal on the Fourth Amendment claim, we need not decide whether a brief or extended seizure of the real estate violated Audio Odyssey's right to procedural due process. On remand, such a claim (if pursued) may depend upon whether the seizure is characterized as "random and unauthorized," or as the result of established state procedures. *See Hudson v. Palmer*, 468 U.S. 513, 533 (1984); *Coleman v. Watt*, 40 F.3d 255, 262 (8th Cir. 1994).

that is "otherwise chargeable to the State." *Id.*; *Wyatt v. Cole*, 504 U.S. 158, 162 (1992). The second element requires more than the private misuse of a state statute (as alleged in the taking of the personal property in this case); a plaintiff must show that the private party acted in concert with or obtained significant aid from state officials who were themselves involved in a constitutional violation. *See Hassett v. Lemay Bank & Trust Co.*, 851 F.2d 1127, 1129-30 (8th Cir. 1988); *Apostol v. Landau*, 957 F.2d 339, 343 (7th Cir. 1992). Otherwise stated, there must be a "meeting of the minds" or a "mutual understanding" between a private party and public officials to engage in conduct that violates the plaintiff's federal rights. *Miller v. Compton*, 122 F.3d 1094, 1098 (8th Cir. 1997).

Audio Odyssey has clearly made a sufficient showing to survive summary judgment. A reasonable jury could find a "meeting of the minds" between Bank's loan officer and vice-president Bradley and attorney Hofmann, on one hand, and Sergeant Barton and Deputy Norris, on the other, to seize Audio Odyssey's real estate even though the state court ordered no such thing. Indeed, on the present record, the idea appears to have been Bradley's to begin with.

We are unpersuaded that the Bank, Bradley, and Hofmann are entitled to any sort of immunity. Qualified immunity does not extend to private defendants who conspire with public officials to violate constitutional rights — at least in the replevin context. *See Wyatt*, 504 U.S. at 168-69. *Wyatt* reserved the question of whether such private defendants might be entitled "to an affirmative defense based on good faith and/or probable cause[,] or that § 1983 suits against private, rather than

governmental parties could require plaintiffs to carry additional burdens." *Id.* at 169. We have not squarely addressed this question, although other circuits have answered it affirmatively. *See, e.g., Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276 (3d Cir. 1994); *Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir. 1993); *Pinsky v. Duncan*, 79 F.3d 306, 313 (2d Cir. 1996). The precise scope of "good faith" immunity accorded by these cases is unclear.

We need not decide whether to recognize such a defense, or define its scope, because doing so would not assist the private defendants. Any immunity that might apply would be no broader than the qualified immunity accorded public officials. *See Wyatt*, 504 U.S. at 167-69 (discussing rationale of public immunity and of extending it to private parties). Hofmann and the Bank's view of the scope of the court's order is no more reasonable than what is now claimed by Sergeant Barton and Deputy Norris.[21] If Sergeant Barton and Deputy Norris are not entitled to qualified immunity, then those who conspired with them are not entitled to its private sector analogue.

As a separate basis for affirmance, Hofmann and his firm offer an "Assignment of Real Estate Lease and Agreement" signed by Dogan Dincer on behalf of Audio Odyssey. The document purports to assign Audio Odyssey's lease to the Bank, but it is unsigned by the store's landlord (one Frank

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21. Although Bradley was not present, and perhaps had no opportunity to study the documents, he had even greater notice that the store itself was not subject to seizure: Sergeant Barton's initial statement that the replevin could not be accomplished without contemporaneous removal of the personal property.

Brown) or by any representative of the Bank. In the event of default, the Assignment allows the Bank to enter the premises without notice, and "using such force as may be necessary," to remove or sell all collateral. Hofmann argues that the Assignment gave him a reasonable belief that Audio Odyssey consented to the seizure of the real estate, and that changing the locks arguably falls within the Assignment's allowance for "such force as may be necessary" to remove the collateral. The district court did not rule on the Assignment's significance, and the issue is not adequately briefed by the parties. We may affirm a grant of summary judgment on any basis supported by the record, *see Wilson v. Spain*, 209 F.3d 713, 716 (8th Cir. 2000), but the record is not adequately clear in this instance. The parties are free to urge their positions before the district court — hopefully in greater detail.[22]

V

Audio Odyssey's remaining assignments of error are without merit. First, there is no viable claim under either section 1983 or otherwise against SBA loan officer Roger Hoffman. On behalf of the SBA, Hoffman authorized the Bank to accelerate Audio Odyssey's loan and to seek a replevin. This act alone does not create liability — regardless of whether Hoffman is alleged to have conspired with the state officials to violate Audio Odyssey's constitutional rights, or whether he is charged with violating them himself as a federal official. The replevin of the personal property was not unconstitutional in the first place. As for the real

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22. We observe that *Fuentes* rejected an argument similar to Hofmann's. *See* 407 U.S. at 95-96.

property, there is no contention that Hoffman had advance knowledge of any scheme to seize Audio Odyssey's premises without court authorization, or that he participated in such a scheme. Accordingly, there was no "mutual understanding" between Roger Hoffman and the other defendants to violate Audio Odyssey's rights. *Miller v. Compton*, 122 F.3d 1094, 1098 (8th Cir. 1997). At most, Hoffman's decision might have breached the SBA's agreement with Audio Odyssey and the Bank, but that is not a constitutional violation and cannot support a viable claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *See Buford v. Runyon*, 160 F.3d 1199, 1203 n.6 (8th Cir. 1998) (stating that *Bivens* claims lie "for violations of constitutionally protected rights"); *Schlake v. Beatrice Production Credit Assoc.*, 596 F.2d 278, 281 (8th Cir. 1979) (no constitutional violation "when a governmental agency breaches a contract it has entered into in the commercial world").

We also reject the supervisory claims against Scott County Sheriff Michael M. Bladel. The suit against Bladel in his official capacity is a suit against the municipality he serves. *See Spencer v. Knapheide Truck Equip. Co.*, 183 F.3d 902, 905 (8th Cir. 1999), *cert. denied*, 528 U.S. 1157 (2000). The County may be liable for unconstitutional acts that implement a county policy or are invoked pursuant to a governmental custom; the custom or policy must be the "moving force" behind the constitutional violation. *Patzner v. Burkett*, 779 F.2d 1363, 1367 (8th Cir. 1985). Audio Odyssey claims that Bladel did not adequately supervise the officers under him. A failure to train officers may amount to a "policy," but this variety of claim generally requires the municipality to have prior notice of its officers' misbehavior

and to act with deliberate indifference thereafter. *See id.* Audio Odyssey cites no evidence of previous Fourth Amendment violations committed by Scott County officials that resemble the one committed by Deputy Norris and Sergeant Barton, nor any evidence that the County had notice of such misconduct. Nor was the danger of Deputy Norris's and Sergeant Barton's seizure "so obvious" that a single occurrence will make the County liable for not training its employees to prevent it. *See Board of County Comm'rs v. Brown*, 520 U.S. 397, 409 (1997); *City of Canton v. Harris*, 489 U.S. 378, 390 (1989). Finally, Audio Odyssey points to the County's "policy" of allowing private parties to complete a "Directions to Sheriff" form to aid officers in serving and executing writs and orders. This argument misstates the County's policy, which requires the officer to follow the writ or order if it conflicts with the "Directions to Sheriff." For that matter, the "policy" of using "Directions to Sheriff" forms is not itself unconstitutional, as an express policy or affirmative custom must be to create municipal liability. *See Patzner*, 779 F.2d at 1367.

Equally without merit is the supervisory claim against Sheriff Bladel in his individual capacity. Sheriff Bladel can be liable for Deputy Norris and Sergeant Barton's constitutional violation only if he "directly participated in the constitutional violation, or if his failure to train or supervise the offending actor caused the deprivation." *Otey v. Marshall*, 121 F.3d 1150, 1155 (8th Cir. 1997) (citation and quotation omitted). The Sheriff did not know about this replevin until he was notified of this lawsuit, and there is no contention that he directly participated in the writ's execution. To be individually liable for failing to train his subordinates,

Sheriff Bladel must have "received notice of a pattern of unconstitutional acts committed by subordinates . . ., demonstrated deliberate indifference to or tacit authorization of the offensive acts . . ., [and] failed to take sufficient remedial action" — and the failure must have proximately caused Audio Odyssey's injury. *Id.* As explained above, there is no showing of previous illegalities that place Sheriff Bladel on the requisite notice. The supervisory claim against him necessarily fails. A similar claim against Sergeant Barton for improperly supervising Deputy Norris fails for the same reason.

VI

For the foregoing reasons, the judgment of the district court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.[23]

LOKEN, Circuit Judge, dissenting in part.

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23. Insofar as there may be individualized matters that are not referred to in this opinion and that the parties have not briefed, such as the liability of defendants Chris A. Pieper and the law firm, Anderson & Nelson, P.C., nothing in this opinion is intended to preempt issues that would otherwise be available for trial — so long as those issues are resolved in a manner consistent with the opinion. In addition, the district court is free to reconsider its dismissal of Audio Odyssey's pendent claims in light of our resolution of the federal claims. Damages from the inability to conduct plaintiff's sale as scheduled cannot, of course, be litigated further except to the extent authorized by state law.

Appendix B

As the Court's thorough opinion makes clear, hindsight suggests that all the parties to this July 1995 dispute acted unreasonably. The Bank sought a replevin order it was unprepared to implement and then insisted its borrower's store premises be immediately seized. The County Sheriffs padlocked store premises that were not encompassed by the replevin order without discussing with Audio Odyssey whether less drastic measures would protect the Bank's interest in the replevined collateral. And Audio Odyssey dallied for weeks rather than take prompt legal action to recover the store premises.

In my view, the key to unraveling these events, at least for purposes of Audio Odyssey's § 1983 claims, lies in the breadth of the replevin order — "All inventory, fixtures, accounts, furniture, equipment and machinery" found on the store premises. The premises were part of a shopping center. Audio Odyssey was a tenant, not the owner, of those commercial premises. Audio Odyssey's only interest in possession of the premises was to operate its retail store. If the store was stripped of all the personal property listed in the court order, it would obviously be inoperable, at least until Audio Odyssey replaced the inventory, fixtures, furniture, equipment, and machinery.

The replevin order gave the Bank the right to immediate possession of all the named personal property. If the order thereby authorized the County Sheriffs to prevent Audio Odyssey from selling the replevied property before the order could be executed — and the court now agrees that it did — then Audio Odyssey's right as a tenant to continuing possession of the store premises was of no immediate value.

That is why it was reasonable for the Bank as secured creditor to urge that Audio Odyssey's store operations cease until the replevin order could be executed. That is why it was objectively reasonable for Sergeant Barton to review the breadth of the replevin order and conclude that it authorized the County Sheriffs to close the store for a reasonable period of time. And that is why Audio Odyssey made no effort to reaccess the store premises until August, after its debtor-creditor negotiations with the Bank had proven unsuccessful.

The district court thoroughly analyzed the applicable constitutional principles and, mindful of the practical considerations that underlie any Fourth Amendment reasonableness inquiry, concluded that defendants are entitled to summary judgment dismissing all § 1983 claims. Applying its own more selective hindsight, the court reverses in part, thereby casting doubt on the accuracy of the Supreme Court's prediction that, when creditors obtain state court orders before seizing property, the Fourth Amendment "should not foment a wave of new litigation in the federal courts." *Soldal v. Cook County*, 506 U.S. 56, 72 (1992). In my view, permitting this case to proceed further in federal court is both wrong and regrettable. Accordingly, I respectfully dissent from Part IV of the court's opinion. I would affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, DAVENPORT DIVISION DATED JANUARY 21, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

No. 3-97-CV-10082
No. 3-97-CV-10125 Consolidated

AUDIO ODYSSEY, LTD., an Iowa Corporation, DOGAN A. DINCER, and ANN M. DINCER,

Plaintiffs,

vs.

BRENTON FIRST NATIONAL BANK, an Iowa Banking Corporation, MICHAEL M. BLADEL, Sheriff of Scott County, Iowa, JOHN M. NORRIS, Deputy Sheriff of Scott County, Iowa CHARLES A. BARTON, Deputy Sheriff of Scott County, Iowa, JOHN C. BRADLEY, CHRIS A. PIEPER, ROGER HOFFMAN, MERCHANTS BONDING COMPANY (Mutual) a Corporation, BERNARD J. HOFMANN and ANDERSON & NELSON, a professional corporation,

Defendants.

ORDER

Appendix C

Before the Court is a motion for summary judgment by defendants Brenton First National Bank, John C. Bradley, Chris A. Pieper and Merchants Bonding Company (collectively, "defendants") filed on October 27, 1999. Audio Odyssey, Ltd., Dogan A. Dincer and Ann M. Dincer ("plaintiffs") filed their resistance to this motion on December 7, 1999. Plaintiffs filed an 82 page brief detailing its resistance, and simultaneously requested the Court grant permission to file an overlength brief. On December 14, 1999 Chief United States Magistrate Judge Ross A. Walters granted plaintiffs' request to file an overlength brief, but limited the brief to 30 pages. Plaintiffs complied with this order and re-filed its brief on December 20, 1999.[1] Defendants replied to plaintiffs' resistence on December 14, 1999. The matter is now considered fully submitted.

1. BACKGROUND

The basic facts underlying plaintiffs' claims were detailed in this Court's prior Order dated October 13, 1999. The Court finds it is unnecessary to fully reiterate all of the facts. However, for purposes of clarity in this Order, a brief capsule of the facts is as follows:

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1. Plaintiffs also filed a Motion to Preserve Record on December 20, 1999. Plaintiffs requested the Court maintain the original 82 page brief the plaintiff filed in resistance to defendants' motion for summary judgment. The Court grants plaintiffs' motion, and will maintain on file plaintiff's 82 page brief for the limited purpose of preserving plaintiffs' record in the event a claim is made that an argument or point of fact was not contained in the plaintiffs' resistance brief.

Appendix C

Plaintiffs entered into a small business loan agreement with defendant, Brenton First National Bank, on October 3 1991. On July 13, 1995, plaintiff Dogan Dincer went to the Bank to make payments for June and July of 1995. Dincer saw defendant Christopher Pieper, Vice President of the Bank, on this day and told Pieper he was making these payments. Pieper said that he understood, and did not inform Mr. Dincer that the payments might be applied in a manner contrary to Dincer's instructions. On July 14, 1995 at approximately 8:50 a.m., defendant John Bradley, a Brenton employee, hand delivered a letter to Dogan Dincer. This letter stated that payment of the balance of the loan, $126,915.20, was to be delivered by 9:00 a.m. as the loan was in default and the Bank was accelerating the debt. Thereafter, defendants instituted a replevin action against the plaintiffs. This action included locking down the Audio Odyssey premises late in the afternoon of July 14. The following week, property was removed from the business premises in accord with the loan agreement.

Procedurally, this action was originally brought by plaintiffs as two separate actions. This Court consolidated these separate cases on June 30, 1999. The claims by plaintiffs which remain[2] before this Court at this time are:

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2. This Court has previously granted summary judgment on all claims against two groups of defendants, the "Scott County Defendants" and "Anderson & Nelson," on the following counts in its October 13, 1999 Order:

Count V — 42 U.S.C. § 1983 Deputy John M. Norris, individual capacity

(Cont'd)

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Count I — 42 U.S.C. § 1983 Private Party Brenton First National Bank
Count II — 42 U.S.C. § 1983 Private Party John C. Bradley
Count III — 42 U.S.C. § 1983 Private Party Christoper A. Pieper
Count IV — 42 U.S.C. § 1983 Private Parties Brenton First National Bank,

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(Cont'd)

Count VI — 42 U.S.C. § 1983 Sergeant Charles A. Barton, individual and supervisory capacity
Count VII — 42 U.S.C. § 1983 Sheriff Michael M. Bladel, individual capacity and supervisory liability
Count VIII — 42 U.S.C. § 1983 Sheriff of Scott County, official capacity
Count X — 42 U.S.C. § 1983 Conspiracy
Count XI — Trespass - pendant [supplemental] jurisdiction
Count I (3-97-cv-10125) — 42 U.S.C. § 1983 Private Party Bernard J. Hoffman
Count II (3-97-cv-10125) — 42 U.S.C. § 1983 Private Party Anderson & Nelson
Count III (3-97-cv-10125) — 42 U.S.C. § 1983 Conspiracy
Count IV (3-97-cv-10125) — 42 U.S.C. § 1983 Private Parties Statute Unconstitutional
Count V (3-97-cv-10125) — Abuse of Process

The "Scott County Defendants" were Michael Bladel, John N. Norris, and Charles A. Barton. "Anderson & Nelson" was the Anderson & Nelson, P.C. Law Firm and one of its attorneys, Bernard J. Hoffman.

Earlier, on December 15, 1997, the Court in another Order granted defendant Roger Hoffman's motion to dismiss Counts IX (section 1983 claim) and X (conspiracy) against him. Roger Hoffman was a loan officer with the Small Business Administration.

Appendix C

Christopher A. Pieper, and John C. Bradley — statute unconstitutional

Count XII — Conversion — pendant [supplemental] jurisdiction

Count XIII — Tortious Interference with Existing Contractual Relations — pendent [supplemental] jurisdiction

Count XIV — Tortious Interference with Prospective Business Relationships — pendent [supplemental] jurisdiction

Count XV — U.C.C. Commercial Reasonableness — pendent [supplemental] jurisdiction

Count XVI — U.C.C. General Obligation of Good Faith — pendent [supplemental] jurisdiction

Count XVII — Action on Replevin Bond — pendent [supplemental] jurisdiction

Count XVIII — Punitive Damages — Actual Malice

Count XIX — Punitive Damages — Legal Malice

Count XX — Impairment of Collateral

Count XXI — Abuse of Process

II APPLICABLE LAW & DISCUSSION

A. Standard of Review

Summary judgment is properly granted when the record, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Walsh v. United States*, 31 F.3d 696, 698 (8th Cir. 1994). The moving party must establish its right to judgment with such clarity that there is no room for

controversy. *Jewson v. Mayo Clinic*, 691 F.2d 405, 408 (8th Cir. 1982). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis added). An issue is "genuine," if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *Id.* at 248. "As to materiality, the substantive law will identify which facts are material. . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

B. Section 1983 Claims

42 U.S.C. § 1983 affords plaintiffs a remedy for deprivations of federal rights.[3] To succeed under section 1983, at a minimum, a plaintiff must prove that the deprivation

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3. A § 1983 claim must state that a person acting under color of state law has deprived the plaintiff of rights protected by the Constitution:

> Every person who, under color of any statute, ordinance, custom, or usage, of any State or Territory or the District of Columbia, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983; *see also Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155-56 (1978).

included " 'rights, privileges, or immunities secured by the Constitution or laws of the United States.' " *Montano v. Hedgepeth*, 120 F.3d 844, 848 (8th Cir. 1997) (citation omitted). A section 1983 plaintiff must also allege "defendant deprived [plaintiff] of a constitutional right while acting 'under color of' state law."[4] *Roudybush v. Zabel*, 813 F.2d 173, 176 (8th Cir. 1987) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970)). Section 1983's color of state law element requires a defendant's actions to be "fairly attributable" to the state. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982). In defining "fairly attributable," the Court has set forth a two-part approach:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.

Lugar, 457 U.S. at 937.[5]

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4. "[M]ost rights secured by the Constitution are protected only against infringement by governments." *Flagg Bros.*, 436 U.S. at 156.

5. The "state policy" component of the *Lugar* approach "may be inferred from either a state statute . . . or a well-settled custom or practice." *Roudybush*, 813 F.2d at 176 (citations omitted).

Appendix C

Lugar involved a debtor who filed a § 1983 action, naming a corporate creditor as the defendant. *Lugar*, 457 U.S. at 924-25. The debtor claimed that the creditor had acted jointly with the state to deprive him of his property without due process through a prejudgment attachment procedure. *Id.* The Court discussed the federal remedies available to a debtor: "If the creditor-plaintiff violates the debtor-defendant's due process rights by seizing his property in accordance with statutory procedures, there is little or no reason to deny to the latter a cause of action under the federal statute, § 1983, designed to provide judicial redress for just such constitutional violations." *Id.* at 934. The Court also made clear that "[j]oint action with a state official to accomplish a prejudgment deprivation of a constitutionally protected property interest will support a § 1983 claim against a private party." *Id.* at 927, n.6 (citing *Adickes v. SH.Kress & Co.*, 398 U.S. 144 (1970)).[6] However, the Court made clear that it did "not hold [] that a 'private party's mere invocation of state legal procedures constitutes 'joint participation' or 'conspiracy' with state officials satisfying the § 1983 requirement of action under color of law.' " *Id.* at 939, n.21.

In discussing the "fairly attributable" approach, the Court stated: "While the private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the

6. And more specifically, the Court stated "[i]f the creditor-plaintiff violates the debtor-defendant's due process rights by seizing his property in accordance with statutory procedures, there is little or no reason to deny to the latter a cause of action under the federal statute, § 1983, designed to provide judicial redress for just such constitutional violations." *Id.* at 934.

product of state action." *Lugar*, 457 U.S. at 941. After examining the facts presented in *Lugar*, the Court dismissed the plaintiff's allegations of private misuse of the state attachment procedure, and let survive the plaintiff's claims that the attachment occurred pursuant to an unconstitutional statute. *Id.* at 940-42. Defendant's alleged misuse of procedures sanctioned by the state was insufficient to satisfy § 1983's state action requirement. *Id.* On the other hand, the unconstitutionality assertion satisfied the color of state law requirement because it was a scheme created and sanctioned by the state. *Id.*

Despite *Lugar*'s two-part approach, in some situations, the state policy and state action components of the color of law requirement are not separate and distinct:

> Although related, the two principles are not the same. They collapse into each other when the claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the state to his decisions (citation omitted). The two principles diverge when the constitutional claim is directed against a party without such apparent authority, i.e., against a private party.

Lugar, 457 U.S. at 937. The section 1983 counts remaining at issue in this case, counts I-IV, involve private party's only. In I-III, the plaintiffs argue the defendants violated their rights under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.

Appendix C

Plaintiffs claim defendants violated their Fourth Amendment rights because real estate was seized, and the state court order under which defendants were acting did not include real estate. They also claim that it was unreasonable for defendants to seize the real estate. This Court in its October 13, 1999 Order found the seizure of property effectuated by all defendants was reasonable. The Court cited *Soldal v. Cook County*, 506 U.S. 56 (1992), *Johnson v. Outboard Marine Corporation*, 172 F.3d 531 (8th Cir. 1999), and Iowa Code §§ 331.653(51) and 643.5 as authority for its finding. In its current resistence to defendants' motion for summary judgment, plaintiff asks this court to depart from its earlier finding that the seizure was reasonable. *See* Plaintiffs' Brief in Resistance to Bank's Summary Judgment Motion, at 1. This Court finds plaintiffs have presented no new legal authority nor factual evidence[7] to sway its decision that the seizure was reasonable.

Plaintiff has also alleged defendants subjected plaintiffs to a temporary taking of the business' premises in violation of the Fifth Amendment. In the October 13, 1999 Order, this Court granted summary judgment on plaintiff's section 1983 claims pertaining to the Fifth Amendment. The Court cited *Walden v. Carmack*, 156 F.3d at 873-4, as authority for

7. Plaintiffs refer to parts of the deposition testimony of Roger Hoffman, attorney for Brenton Bank on July 14, 1995, and Sergeant Barton, as evidence that locking down Audio Odyssey's premises was an unreasonable seizure. This testimony, however, only shows that the joint decision between the Bank and the Scott County Sheriff's office to lock down the premises occurred late in the day of July 14, 1995. This matter of timing does not necessitate that the seizure was unreasonable.

granting summary judgment, as *Walden* points out the value of post-deprivation remedies in seeking the return of seized property. Plaintiffs present no new arguments with respect to their similar claim against these defendants.

The due process violations alleged by the plaintiffs were rejected in this Court's previous opinion. *Johnson v. Outboard Marine Corporation*, 172 F.3d 531 (8th Cir. 1999) was cited as controlling precedent on the plaintiffs' allegation of a procedural due process violation, and the same applies with respect to the current motion. And, concerning the substantive due process claim, the previous Order governs as plaintiffs present no explanation as to how this right was infringed.

Finally, under Count IV, plaintiffs argue that the Iowa replevin statute is unconstitutional and that the use of this statute by private actors — the Bank, its vice president (Pieper) and an employee (Bradley) — should afford plaintiffs damages under 42 U.S.C. § 1983. For this proposition, plaintiffs rely upon *Mullane v. Central Hanover Bank & Trust*, Co., 339 U.S. 306 (1950), *Matthews v. Eldridge*, 424 U.S. 319, 332-33 (1976), *Connecticut v. Doehr*, 501 U.S. 1 (1991),[8] and *Fuentes v. Shevin*,

8. Just to briefly expand upon this Court's prior Order, the Court again notes plaintiffs' reliance upon *Connecticut v. Doehr*, 501 U.S. 1 (1991). At issue in *Doehr* was a state statute which allowed a plaintiff to attach before judgment if plaintiff could show "there is probable cause to sustain the validity of the plaintiff's claim." *Id.* at 13. Peter DiGiovanni used this statute to go into a state district court, prepare an affidavit with five one-sentence paragraphs regarding a physical altercation he had with Doehr, and the court then found probable cause that Doehr had caused physical injury to DiGiovanni. The court issued a writ of attachment "to the value of

(Cont'd)

407 U.S. 67 (1972). "Without doubt, state procedures for creating and enforcing attachments, as with liens, 'are subject to the strictures of due process.' " *Doehr*, 501 U.S. at 12 (citations omitted). However, as this Court already ruled in its previous October 13, 1999 Order, the Iowa replevin statute is constitutional facially and as applied. *See Mitchell v. W. T. Grant*, Co., 416 U.S. 600 (1974) ("[A] hearing must be had before one is *finally* deprived of his property.") (emphasis added).

(Cont'd)
$75,000," which was carried out by the sheriff who attached Doehr's property and alerted Doehr of his right to a post-attachment hearing. *Id.* at 5-7. The Supreme Court declared the Connecticut statute unconstitutional. Clearly part of the Supreme Court's rationale for finding this unusual state statute unconstitutional was that "[u]nlike determining the existence of a debt or delinquent payments, the issue does not concern 'ordinarily uncomplicated matters that lend themselves to documentary proof.' " *Id.* at 14 (quoting *Mitchell v. W. T. Grant*, 416 U.S. 600 (1974)). And as further rationale for its decision, the Supreme Court noted that in Doehr's case the plaintiff did not have a concern that Doehr was about to encumber or transfer his real estate, concerns which the Court stated "permit[] postponing any notice or hearing until after the attachment is effectuated." *Id.* at 16 (citations omitted).

Doehr does not support plaintiff's argument that the Iowa replevin statute is unconstitutional. In this case, the underlying facts which led to the attachment were "uncomplicated matters that len[t] themselves to documentary proof." And at issue in this case was a retail business, for which the transfer of property was a real concern. The state court judge issuing the writ knew the debtor was a retail business, thereby making the exigent circumstance of the sale of inventory apparent to the state court judge at the time the writ was issued.

For the above stated reasons, defendants' motion for summary judgment on Counts I-IV of plaintiffs' complaint are granted.

C. Remaining Counts

"A district court may exercise supplemental jurisdiction over state law claims that arise from the same nucleus of operative fact as the plaintiff's federal claims and when the plaintiff would ordinarily be expected to try all the claims in one judicial proceeding." *Cossette v. Minnesota Power & Light*, 188 F.3d 964, 973 (8th Cir. 1999) (citing *Kansas Pub. Employees Retirement Syst. v. Reimer & Koger Assocs., Inc.*, 77 F.3d 1063, 1067 (8th Cir. 1996)). However, the Court does not have to exercise supplemental jurisdiction over state law claims if "the [state law] claim[s] substantially predominate[] over the claim or claims over which the district court has original jurisdiction." 28. U.S.C. § 1367 (c)(2). Nor does the Court have to exercise its supplemental jurisdictional powers if it "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367 (c)(3); *see also Franklin v. Zain*, 152 F.3d 783, 786 (8th Cir. 1998).

In this case, there remain no claims over which this Court has original jurisdiction. The remaining counts involved in the action implicate state law and will involve extensive interpretation of state law. Furthermore, although this matter has been before this Court for some time now, this Court has not devoted significant time to adjudicating the remaining specialized state law issues. Until now, this Court has dealt primarily with the federal counts brought by the plaintiff. The state claims are dismissed pursuant to Federal Rule of

Civil Procedure 12(h)(3). The Court therefore declines to exercise its supplemental jurisdiction in this matter when only state law claims remain.

III. CONCLUSION

Therefore, defendants' motion for summary judgment with respect to plaintiffs' section 1983 claims is **granted.** Further, the state claims are **dismissed** pursuant to Federal Rule of Civil Procedure 12(h)(3) to allow plaintiffs to refile in Iowa District Court.

IT IS SO ORDERED.

Dated this 21st day of January, 2000.

s/ Ronald E. Longstaff
RONALD E. LONGSTAFF, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, DAVENPORT DIVISION DATED AND FILED OCTOBER 13, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

No. 3-97-CV-10082
No. 3-97-CV-10125 Consolidated

AUDIO ODYSSEY, LTD., an Iowa Corporation, DOGAN A. DINCER, and ANN M. DINCER,

Plaintiffs,

vs.

BRENTON FIRST NATIONAL BANK, an Iowa Banking Corporation, MICHAEL M. BLADEL, Sheriff of Scott County, Iowa, JOHN M. NORRIS, Deputy Sheriff of Scott County, Iowa CHARLES A. BARTON, Deputy Sheriff of Scott County, Iowa, JOHN C. BRADLEY, CHRIS A. PIEPER, ROGER HOFFMAN, MERCHANTS BONDING COMPANY (Mutual) a Corporation, BERNARD J. HOFMANN and ANDERSON & NELSON, a professional corporation,

Defendants.

ORDER

Appendix D

The Court has before it two defendants' motions for summary judgment.[1] Defendants Michael Bladel, John N. Norris, and Charles A. Barton ("Scott County Defendants") filed a motion for summary judgment March 15, 1999. Plaintiffs[2] resisted this motion May 10, 1999,[3] and the Scott County Defendants filed a reply brief May 27, 1999. Defendants Bernard J. Hofmann ("Hofmann") and Anderson & Nelson, P.C. ("Anderson & Nelson") (collectively "the Anderson Defendants") filed a motion for summary judgment May 12, 1999. Plaintiffs resisted this motion June 8, 1999. Defendants filed a reply brief June 21, 1999, with a supplemental appendix. Although plaintiffs filed a motion to strike an exhibit in the Anderson Defendants' supplemental appendix, the Court denied the motion and instead granted plaintiffs additional time to respond to the newly submitted exhibit. Pursuant to this Court's Order, plaintiffs filed a response August 20, 1999.

On July 28, 1999, the Scott County Defendants filed a supplement to their motion for summary judgment, similar to the supplement filed by the Anderson Defendants. Chief

1. The above-captioned case was originally filed as two separate actions until this Court consolidated the cases June 30, 1999. The motions for summary judgment were filed prior to consolidation.

2. In prior Orders, this Court has dismissed plaintiffs Dogan and Ann Dincer from some, but not all, claims. To avoid confusion in this Order, the Court shall use the term "plaintiffs" even when discussing claims for which Audio Odyssey remains the sole plaintiff.

3. A brief and a statement of material facts in dispute were not filed until May 19, 1999. Plaintiffs filed both a corrected brief and a statement of material facts in dispute June 11, 1999.

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Magistrate Judge Ross A. Walters granted plaintiffs until August 18, 1999, to respond to the supplement. Plaintiffs filed a motion to strike the supplement August 17, 1999. The Scott County Defendants did not resist the motion, and the motion is therefore granted. The Scott County Defendants' Supplement to Motion for Summary Judgment, filed July 21, 1999, is accordingly stricken from the record.

I. BACKGROUND

A. Factual Background

Audio Odyssey is a retail electronics store, incorporated, in Iowa. At all times pertinent to this action, Dogan Dincer ("Dincer") was the sole shareholder and president of Audio, and Ann Dincer ("Mrs. Dincer") was Dogan's wife. Dincer purchased stock from the majority shareholder of Audio Odyssey on October 3, 1991. Dincer then became the sole shareholder. Prior to purchasing the company, he had worked as an Audio Odyssey employee fourteen years, and had been a part-owner for eight years. He purchased the stock in part using proceeds from a $200,000 loan from Brenton First National Bank ("Brenton"). The loan was guaranteed by the Small Business Administration ("SBA").

By terms of the note, Audio Odyssey promised to pay the bank $200,000 plus interest through monthly payments in the amount of $3,399, beginning November 3, 1991, and continuing until October 3, 1998, or until the loan had been paid. As security for the note, Audio executed a Business Security Agreement (the "Agreement"). In the Agreement, Audio granted Brenton a security interest in certain property located on the Audio Odyssey business premises.

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On July 13, 1995, Dincer arrived at Brenton Bank to make the June and July monthly payments on the loan to Brenton. Dincer instructed the bank teller to apply the $6,983 payment to the Audio Odyssey loan. Dincer believed that these payments would make his loan current. While Dincer was at the bank, he saw Brenton's Vice President, Christopher Pieper. Dincer mentioned to Pieper that he had finished making the June and July payments on his loan. Pieper responded that he understood, and did not inform Dincer that the payments might be applied in a manner contrary to Dincer's instructions. The Bank apparently applied the payment to overdrafts rather than the loan.

In a demand letter dated July 13, 1995, Steven Nelson, one of the bank's attorneys, informed Mr. Dincer that because he was in default, Brenton was accelerating the debt. The letter instructed Dincer to deliver payment of the $126,915.20 balance to Brenton by 9:00 a.m., July 14, 1995 or to deliver to the bank possession of the property subject to the Agreement by the same date and time. John Bradley, a Brenton employee, hand-delivered the letter to Dincer on July 14, 1995, at approximately 8:50 a.m. Dincer telephoned Bradley and told him that he could not obtain the funds in ten minutes. Dincer gave Bradley the phone number of his attorney, Stephen Wing. Around noon that day Wing faxed a letter to Anderson & Nelson. The letter stated the Audio Odyssey loan was not in default, Brenton's actions involving delayed decisions and misinformation regarding certain lines of credit were wrongful; and Wing was authorized to accept service for Audio.

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Bernard Hofmann ("Hofmann"), an Anderson & Nelson attorney doing work for Brenton, one of the firm's clients, filed a petition in replevin[4] during the afternoon of July 14. Hofmann also filed a bond. He presented the petition to a Scott County judge and obtained an ex parte order of replevin.[5] Pursuant to the judge's order, the clerk's office issued a writ of replevin shortly after the order was filed.

The Replevin Order and the Writ of Replevin ordered the sheriff or sheriff's representative to take from Audio Odyssey and deliver to Brenton Bank:

> ALL INVENTORY FIXTURES ACCOUNTS FURNITURE, EQUIPMENT AND MACHINERY ON PROPERTY DESCRIBED AS FOLLOWS: 4,050 SQUARE FEET LOCATED AT 1718 E KIMBERLY ROAD, DAVENPORT, IOWA, LEGALLY DESCRIBED AS: PART OF THE NORTHWEST QUARTER OF THE SOUTHWEST QUARTER OF SECTION 18, TOWNSHIP 78,

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4. Specifically, plaintiffs' claim that the petition was false in stating: (1) Audio Odyssey was "delinquent in the payment of installments under this note"; (2) Audio Odyssey failed to maintain insurance on July 14, 1995; (3) Audio Odyssey failed to provide accurate and complete financial records; (4) immediate action was required to protect the bank's property; (5) waiving notice and entering an ex parte order would be appropriate under the circumstances; (6) Audio Odyssey had accumulated unpaid taxes of $48,000. Complaint, ¶ 25.

5. The petition was filed at 1:44 p.m., and the order of replevin was issued at 2:07 p.m.

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RANGE 4, EAST OF THE P.M. . . . TO THE CITY OF DAVENPORT, SCOTT COUNTY, IOWA.

Exhibits 5 (Replevin Order), 6 (Writ of Replevin). The Kimberly Road address referred to the Audio Odyssey business premises.

At approximately 3:25 p.m. on July 14, 1995, Attorney Hofmann arrived at the Scott County Sheriff's office with the Order and Writ of Replevin. He requested that the writ be served immediately, and was instructed to fill out a "Directions to Sheriff" form (the "Directions" or "Directions form"). Sergeant Barton explained to Hofmann that when a party requests the sheriff's office to enforce a writ of replevin, the standard procedure is to ask the person to complete a Directions form, explaining what action the creditor would like the sheriff's representative to undertake. Barton informed Hofmann that because it was late Friday afternoon, the service deputies would soon be leaving work. He also noted it would be impossible to take the relevant property because Hofmann was not prepared with movers and trucks. Sergeant Barton further explained to Hofmann that he needed to arrange to have ready moving vehicles and people to perform inventory.

Realizing that he was unprepared to take the property subject to replevin, Hofmann called John Bradley at Brenton Bank. After speaking to Bradley, Hofmann asked Sergeant Barton if they could lock down the Audio Odyssey premises for the weekend until Monday when the sheriff's department could oversee the inventory of property and he could arrange to have ready movers. Hofmann explained that locking down Audio Odyssey would prevent the Dincers from selling off

the property subject to the replevin. Sergeant Barton testified to his response as follows:

> I looked at the writ of replevin, and I did see a legal description for the property on there, and I said that would probably be possible; then Monday morning go in and start inventorying the items. I asked him to fill out the directions to the sheriff and give it to one of the ladies [at the sheriff's department] and we'd have a deputy go up and meet him there.

Barton Depo. at 16. On the Directions, Hofmann wrote that the sheriff's representative should serve Dogan Dincer at the premises and then should contact John Bradley from Brenton Bank who would "meet you at store w/a locksmith." Exhibit 6. Around this time, Sergeant Barton assigned the matter to Deputy John Norris, and left the office.

Deputy Norris arrived at the Audio Odyssey premises and met Bradley. Norris Depo. at 28. Norris carried with him papers, including a copy of the order and writ.[6] *Id.* at 30-31. He entered the store with Bradley and asked an employee if he could speak to the owner. He proceeded to speak with Dogan Dincer. At his deposition, Norris testified: "I told Mr.

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6. Plaintiffs state in their Material Facts in Dispute: "[Deputy Norris] apparently served the writ, but not the petition and order. Nor did he serve an original notice. (See Group Exhibit 6, Norris Deposition Transcript, pp. 29-32, 34, 34, 44.)" Plaintiff's Corrected Statement of Material Facts in Dispute, ¶ 27. The Court has carefully examined the cited transcript pages, and believes Deputy Norris did not state that he failed to serve the petition, order, and original notice.

Dincer that I had some legal papers for him filed by the bank and explained to him what they were, then proceeded to read the order of attachment explaining what we were going to do, told him the bank was here to seize the property and if he had any questions from that point." Norris Depo. at 34. Norris also testified that he served Dincer with copies of the papers he was carrying.

Dincer asked Deputy Norris for additional time, and Norris asked Bradley. Bradley wanted to proceed. Norris then instructed the locksmith to begin changing locks on the front and back door. He had a brief discussion with an Audio Odyssey employee who asked if the employees could remove their own personal property. Bradley consented, and Norris told the employees they could remove their personal property from the premises. At approximately 4:45 p.m., Norris told the employees that they could continue to remove their property until the locksmith was finished, and at that point, the business would be locked down. When the locksmith finished, Deputy Norris secured the premises and posted "No Trespassing by Order of Mike Bladel, Sheriff of Scott County, Iowa Number 353" notices on the front and back doors. Norris may or may not have kept his key to the Audio Odyssey premises.[7] He met a bank representative at Audio

7. The Answer of the Scott County Defendants admitted the allegations in paragraph 47 of the Complaint, which stated: When everyone was out of the store, Deputy Sheriff Norris took the keys from Mr. Dincer and locked the doors. He gave the keys to John C. Bradley." Complaint, ¶ 47. The Scott County Defendants repeat this admission in the factual background of their motion for summary judgment. Yet, Deputy Norris testified at his deposition that he (Cont'd)

Odyssey on the following Monday morning and unlocked the premises. The bank representative had a moving company prepared and they started inventorying the assets. Norris testified that they completed the removal of property Tuesday evening or Wednesday morning. When the procedure was complete, Deputy Norris testified that he turned the key over to the bank, along with the inventory sheets and property. He did not remember whether the "No Trespassing" sign was removed from the premises. After the property was removed from the business premises, the Dincers requested from Brenton the return of the real estate. In a court order dated August 31, 1995, a Scott County district court judge continued the scheduled post-deprivation hearing on the matter, but granted Audio Odyssey the right to its real estate and permission to remove the sheriff's "No Trespassing" signs. Plaintiffs presented no evidence to indicate they requested return of the real estate by talking to the sheriff's office prior to the August hearing on the matter.

(Cont'd)

thought he kept the key, because the usual department policy was to hold the key as a neutral third party. Norris Depo. at 38. When asked again, Deputy Norris testified:

> I don't really recall, but as policy, practice, on my part, since I'm the neutral party, I would have keep [sic] the key. Now, the bank-or the locksmith may have given the bank another key, but I would almost say that I had a key. In fact, I know I had a key, because I had it attached with the paperwork on just a paperclip. Whether the locksmith gave the bank another key, I don't know.

Norris Depo. at 40.

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B. Standard of Review

Summary judgment is properly granted when the record, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Walsh v. United States*, 31 F.3d 696, 698 (8th Cir. 1994). The moving party must establish its right to judgment with such clarity that there is no room for controversy. *Jewson v. Mayo Clinic*, 691 F.2d 405, 408 (8th Cir. 1982). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis added). An issue is "genuine," if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *Id.* at 248. "As to materiality, the substantive law will identify which facts are material.... Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

II. SCOTT COUNTY DEFENDANTS

Plaintiffs allege several charges against the Scott County Defendants, including several section 1983 claims alleging constitutional deprivations: Count V against Deputy John Norris in his individual capacity, Count VI against Sergeant Charles A. Barton in his individual and supervisory capacity, Count VII against Sheriff Michael Bladel in his individual and supervisory capacity, Count VIII against the Scott County Sheriff in his official capacity, and Count X, in which the

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Scott County Defendants are named as co-conspirators in a conspiracy to deprive plaintiffs of their constitutional rights. All section 1983 claims allege constitutional deprivations under the Fourth Amendment (unreasonable seizure), Fifth Amendment (property taken without due process and just compensation) and Fourteenth Amendment (denial of substantive due process and procedural due process). *See* Corrected Memorandum of Law in Support of Resistance to Scott County Defendants' Motion for Summary Judgment, at 12-21. Plaintiffs also allege Count XI, a state law trespass claim, against Norris and Bladel.

A. Qualified Immunity

Defendants Norris and Barton argue they are entitled to qualified immunity regarding the section 1983 claims against them in their individual capacity. "Public officials, such as governors, prison officials, school board members, parole board members, and police officers, who exercise some discretionary functions while carrying out their executive duties generally have available to them qualified immunity from § 1983 actions." *Walden v. Carmack*, 156 F.3d 861, 869 (8th Cir. 1998). The rationale for the qualified immunity doctrine

> is to allow public officers to carry out their duties as they think right, rather than acting out of fear for their own personal fortunes. Toward this end, the rule has evolved that an official performing discretionary functions will generally be immune from liability unless a reasonable person in his

position would have known that his actions violated clearly established law.

Miller v. Compton, 122 F.3d 1094, 1098 (8th Cir. 1997) (citations omitted).[8]

The issue of whether summary judgment is appropriate on qualified immunity grounds, based on a particular set of facts, is a matter of law. *Lambert v. City of Dumas*, __ F.3d __, available at 1999 WL 592412, at * 2 (8th Cir. Aug 9, 1999). To withstand a claim to qualified immunity at the summary judgment stage, a plaintiff must show: 1) violation of a constitutional or statutory right; 2) the right must have been clearly established at the time of the violation; and 3) given the facts most favorable to the plaintiff, there must be no genuine issue of material fact as to whether a reasonable official would have known that the alleged actions violated that right. *See Mettler v. Whitledge*, 165 F.3d 1197, 1202 (8th Cir. 1999) (citations omitted); *see also Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 536 (8th Cir. 1999) ("In section 1983 actions against public officials in their individual capacity, a plaintiff must show that the defendant violated clearly established statutory or constitutional rights of which a reasonable person would have known.") (citations and internal quotation marks omitted). A claim to

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8. Plaintiffs argue Deputy Norris was not acting in a discretionary capacity. In light of plaintiffs' criticisms of Deputy Norris' unsupervised acts and decisions at the Audio Odyssey premises, such as his alleged distribution of the Audio keys to the bank and the fact that he apparently forgot to take down the "No Trespassing" sign, the Court finds this claim has no merit and declines to further address it.

a generalized right is inadequate to satisfy the "clearly established" standard. *See Mettler v. Whitledge*, 165 F.3d 1197, 1202-03 (8th Cir. 1999). Rather, the right must be "clearly established in a particularized sense relevant to the case at hand." *Id.* at 1203.

1. Fourth Amendment

Plaintiffs argue that the seizure of real estate in the instant case was unreasonable because "Audio Odyssey's real estate was seized, which was not within the court order, nor was the sheriff's department acting reasonably. They were acting without any basis in the law and/or under an unconstitutional statute." Corrected Memorandum of Law in Support of Resistance to Scott County Defendants' Motion for Summary Judgment, at 17.

"A seizure of property . . . occurs when there is some meaningful interference with an individual's possessory interest in that property." *Soldal v. Cook County*, 506 U.S. 56, 61 (1992) (citation and internal quotation marks omitted). If a seizure has occurred, then it should be examined for its overall reasonableness. *Samuels v. Meriwether*, 94 F.3d 1163, 1167-68 (8th Cir. 1996); *see also Johnson*, 172 F.3d at 536. *Soldal* is recognized as establishing a high standard of unreasonableness in cases where the officers seizing property are acting pursuant to a court order:

> The reasonableness determination will reflect a careful balancing of governmental and private interests. . . . Assuming for example that the officers were acting pursuant to a court order . . .

> and as often would be the case, a showing of unreasonableness on these facts would be a laborious task indeed.

Coleman v. Watt, 40 F.3d 255, 263 (8th Cir. 1994) (citing *Soldal*, 506 U.S. at 71) (internal citations and quotation marks omitted).

For purposes of this Order, the Court will assume without further discussion that a seizure occurred. The Court must next address whether the seizure was objectively reasonable, as required by *Soldal*. *See* 501 U.S. at 71. Attorney Hofmann delivered to Sergeant Barton and Deputy Norris a court order instructing the sheriff's department to take possession of the personal property at Audio Odyssey, and Hofmann indicated he desired that they enforce the order immediately. Although the deputies questioned the necessity of immediate enforcement of the writ and order, they believed their duty was to enforce the order as requested, a belief that is reasonable in light of Iowa law, which described the Sheriff's duties in pertinent part "The Sheriff shall . . . carry out duties relating to an action of replevin as provided in Chapter 643." Iowa Code § 331.653(51). Chapter 643 provides in relevant part: "Upon direction of the court after notice and opportunity for such hearing as it may prescribe, the clerk shall issue a writ under the clerk's hand, and the seal of the court directed to the proper officer, *requiring the officer to take the property described and therein deliver it to plaintiffs*." Iowa Code § 643.5 (emphasis added).

In locking down the Audio Odyssey premises, deputies Norris and Barton intended to abide by the mandates of the

Iowa Code and the Replevin Order and Writ. Attorney Hofmann, having obtained a court order, indicated closing the business was a necessary and proper manner of enforcing the writ. Additionally, although the writ and order did not expressly provide for seizure of real property, the address was listed, contributing to the deputies' confusion. The amount of property located at the premises and subject to the writ was sizeable. Because Audio Odyssey was a retail establishment, the Bank's expressed concern that merchandise might be sold during weekend business hours was legitimate. Deputy Norris returned to the premises Monday morning to oversee the inventorying and moving of property. Plaintiffs present no evidence to support an alternate version of the deputies' testimony. Although plaintiffs complain that they were not permitted to re-enter the premises until August 31, 1995, they present no facts suggesting this was the fault of any representative of the sheriff's office, and they do not indicate that they attempted to contact the sheriff's office to effectuate re-entry. The sheriff's department was involved with the replevin only until the writ and replevin order were completed. Again, plaintiffs have set forth no evidence to the contrary.

Under the above-described circumstances, the Court finds the actions of Deputies Norris and Barton were objectively reasonable, and that no genuine issues of fact exist for trial on this issue. A recent case from the Eighth Circuit Court of Appeals supports this conclusion. In *Johnson v. Outboard Marine Corporation*, a sheriff's deputy erroneously seized a boat and trailer, pursuant to a writ of execution. 172 F.3d at 533-34. The owner of the boat and trailer filed a section 1983 suit against the sheriff and his

deputies as well as the creditors and creditors' counsel, alleging constitutional violations under the Fourth and Fourteenth Amendments. *Id.* The Eighth Circuit affirmed the district court's grant of summary judgment in favor of the defendant sheriff's department personnel on the unreasonable seizure claim, noting: "[T]he fact that [the sheriff's deputy] was in error does not in itself make the seizure unreasonable. *Cf. Hill v. California*, 401 U.S. 797, 91 S.Ct. 1106, 28 L. Ed.2d 484 (1971) (officer who makes a reasonable mistake in executing an arrest warrant and arrests the wrong person does not violate the Fourth Amendment)." *Johnson*, 172 F.3d at 537.

Similarly, in the instant case, no facts suggest the deputies acted in any manner except under a good faith belief that they were properly executing Iowa law and the mandates of the replevin order and writ. Plaintiffs challenge the deputies actions, noting their many years of experience and training, yet such information does not forward the claim that their actions were unreasonable. Deputy Norris' apparent failure to remove the "No Trespassing" signs after the completion of inventory and removal of property likewise does not suggest an unreasonable seizure. There is no indication in the record before the Court that Norris or Barton attempted to prevent the Dincers from returning to the Audio premises after the inventory and removal were completed. Through their affidavits and deposition testimony, the Scott County defendants have all indicated that they were unaware of any potential constitutional infirmity in closing down Audio Odyssey. The Court finds that under the unique facts and circumstances presented, the seizure was objectively reasonable. *See Soldal*, 506 U.S. 71-71 (noting many seizures,

including "negligent actions of public employees that interfere with individuals' right to enjoy their homes," will survive constitutional scrutiny under a reasonableness determination).

Because plaintiffs have not established a constitutional violation, the Scott County defendants did not violate a clearly established constitutional right of which a reasonable person would have known.[9] *See Johnson*, 172 F.3d at 536. Thus, summary judgment is granted in favor of the Scott County defendants in their individual capacity with regard to plaintiffs' section 1983 claims pertaining to the Fourth Amendment.

2. Fifth Amendment

Plaintiffs also argue the Audio premises were subject to a temporary taking, in violation of the Fifth and Fourteenth Amendments. Plaintiffs present little argument on this issue except for a case quotation noting that a party must be afforded notice of a hearing prior to a seizure for civil forfeiture, and a case quotation noting that temporary regulatory takings are actionable. Neither is applicable to the instant case.

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9. Even if this Court found that the fact issues existed as to the objective reasonableness of the seizure, the claim would still not survive summary judgment because plaintiffs have not established a fact issue that the right was one clearly established so that a reasonable person would have been aware that he was depriving plaintiffs of a constitutional right. Plaintiffs have not set forth any authority to suggest that an erroneous seizure, made in good faith, can support a section 1983 claim in which the plaintiff claims a deprivation of rights under the Fourth Amendment.

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Plaintiff have presented no argument explaining why the Court should consider this a takings case, and what issues of material fact surrounding the takings issue exist for trial. The Court therefore finds plaintiffs have not set forth a violation of a constitutional right that has been clearly established. Accordingly, the Court grants summary judgment in favor of the Scott County Defendants in their individual capacity with regard to plaintiffs' section 1983 claim pertaining to the Fifth Amendment. *See also Walden v. Carmack*, 156 F.3d at 873-74 (finding summary judgment based on qualified immunity appropriate because plaintiffs had post-deprivation remedies through which they could seek return of seized property).

3. Due Process Clause

Alleging both substantive due process and procedural due process violations, plaintiffs also argue they were deprived of property without due process of law in violation of the Fourteenth Amendment.

a. Procedural Due Process

The Due Process Clause of the Fourteenth Amendment historically applies to "deliberate decisions of government officials to deprive a person of life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986) (citations omitted). "Due process is a flexible concept, and its procedural protections will vary depending upon the particular deprivation involved." *Johnson*, 172 F.3d at 537. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a

meaningful manner." *Hroch v. City of Omaha*, 4 F.3d 693, 696 (8th Cir. 1993) (citations and internal quotation marks omitted). "By requiring the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property,' the Due Process Clause promotes fairness in such decisions." *Id.* "In procedural due process claims, the deprivation by state, action of a constitutionally protected interest in life, liberty, or property is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (citations and internal quotation marks omitted). The Clause does not provide a "blanket protection" against all deprivations of property by the State, only those occurring without due process of law. *Gentry v. Lee's Summit*, 10 F.3d 1340, 1343 (8th Cir. 1993).

Plaintiffs' brief indicates their procedural due process claim complains that they were not afforded notice of the deprivation and a meaningful opportunity to be heard. *See* Corrected Memorandum of Law in Support of Resistance to Scott County Defendants' Motion for Summary Judgment, at 20.

Johnson v. Outboard Marine Corporation illuminates the instant case. 172 F.3d at 537. As previously discussed, the plaintiff in *Johnson* filed a section 1983 action against the sheriff and his deputies after they had erroneously seized a boat and trailer, believing them to be subject to a valid writ of execution. In addressing the plaintiffs' procedural due process claim, the Eighth Circuit affirmed the district court's grant of summary judgment in favor of defendants, noting:

> This is simply a case involving a levy on personal property to satisfy a judgment. It was accomplished

> according to well-established and traditional state law concepts, the validity of which the plaintiffs do not challenge. The property turned out to be not subject to the levy and it was returned. To argue that the dispossession becomes unconstitutional simply because the deputy serving the writ should have known these facts beforehand, borders on the frivolous.

Johnson, 172 F.3d at 537.

Similarly, in the instant case the sheriff's representatives were attempting to secure the premises containing a large amount of personal property subject to a writ of replevin. The sheriff's deputies locked down the business for the weekend and two or three days, the time sufficient for moving and inventory of the items to be completed. When the deputies were involved in locking down the business they believed they were acting pursuant to a court order. Their role in the matter, misunderstanding or misinterpreting the order's mandate, is not appropriately categorized as a procedural due process violation. Although the Dincers did not return to the Audio Odyssey premises until a court order stated they could take down the sheriffs "No Trespassing" signs, there is no evidence before the Court to indicate that the sheriff's office, including Norris and Barton, took any action to keep the business closed down. Deputy Norris set forth the only evidence explaining why the signs remained on the premises, and he indicated he may have forgotten to remove the signs. Such action may suggest negligence, but does not rise to the deliberative efforts necessary to state a due process claim.

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The manner in which the deputies, in their individual capacity, allegedly denied plaintiffs of procedural due process is indeterminate. Their role in the matter was to carry out an order and writ of replevin. Even if they did erroneously interpret the order and writ, such action does not rise to the type of deliberate decision necessary to reach a finding that plaintiffs were denied due process. Under the facts presented, the Court finds Deputies Barton and Norris did not violate plaintiffs' procedural due process rights and no genuine issues of material fact exist for trial. The Court finds Deputies Norris and Barton entitled to qualified immunity in their individual capacities on the procedural due process claim.

b. Substantive Due Process

Plaintiffs argue Deputies Barton and Norris deprived them of substantive due process, yet present no explanation as to the right they believe was infringed. As noted previously, a general allegation that constitutional rights were violated is insufficient to withstand a motion for summary judgment. Plaintiffs have therefore failed to establish an essential element of their claim and the Court grants summary judgment in favor of defendants.

4. Sheriff Bladel

A supervisor may be liable in his individual capacity if he directly participated in a constitutional violation. *See Springdale Education Ass'n v. Springdale School District*, 133 F.3d 649, 653 (8th Cir. 1998). Sheriff Bladel indicated that he was not personally involved in any of the decisions or actions relating to the instant case, and plaintiffs have not

presented evidence to the contrary. In fact, Sheriff Bladel did not have knowledge of the events at issue until this lawsuit was filed. The Court therefore finds Sheriff Bladel entitled to qualified immunity, insulating him from liability for the section 1983 claims against him in his individual capacity, set forth in Count VII.

5. Conclusion

In the resistance brief, plaintiffs explain that they included four constitutional violations in the section 1983 claims against Deputies Barton and Norris and Sheriff Bladel in their individual capacity. The Court finds the Scott County defendants entitled to qualified immunity with regard to all section 1983 claims against them in their individual capacity. This judgment disposes of Count V (against Deputy Norris in his individual capacity) in its entirety. Count VI (against Sergeant Barton) and Count VII (against Sheriff Bladel) remain to the extent that they include supervisory capacity claims, which the Court shall review forthwith.

C. Supervisory Capacity Claims

As noted, Counts VI and VII, alleged against Sergeant Barton and Sheriff Bladel respectively, include claims against them in their supervisory capacity. The law is well settled that "A supervisor is not vicariously liable under 42 U.S.C. § 1983 for an employee's unconstitutional activity." *White v. Holmes*, 21 F.3d 277, 280 (8th Cir. 1994) (citations omitted); *see also Miller v. Compton*, 122 F.3d 1094, 1100 (8th Cir. 1997) (affirming grant of summary judgment in favor of defendant because under section 1983, liability cannot be

imposed on police chief for deputy's decision); *Otey v. Marshall*, 121 F.3d 1150, 1155 (8th Cir. 1997). The Court finds Deputy Barton and Sheriff Bladel cannot be liable in their supervisory capacity for any alleged constitutional violation performed by Deputy Norris and therefore the Court grants summary judgment in favor of defendants regarding Count VI, the supervisory liability claim against Sergeant Barton.

To the extent that plaintiff's supervisory capacity claims consist of failure to supervise or train, the Court finds summary judgment appropriate because plaintiffs have set forth absolutely no facts, aside from conclusory allegations, in support of their training or supervisory claims. Proof of a failure to supervise claim requires the plaintiff to establish the following: (1) the supervisor received notice of a pattern of unconstitutional acts committed by subordinates; (2) the supervisor demonstrated deliberate indifference to or tacit authorization of the offensive acts; (3) the supervisor failed to take sufficient remedial action; and (4) the supervisor's failure to take sufficient remedial action proximately caused injury to the plaintiff. *See Otey*, 121 F.3d at 1155 (citation omitted).

As noted, plaintiffs have presented no such proof in their responsive pleadings and associated filings. Such bare allegations, without evidentiary support, are insufficient to survive a motion for summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986) (Rule 56 contains no express or implied requirement that the moving party support its motion with affidavits or other evidence negating the opponent's claim); *Brandt v. Davis*, __ F.3d __, available

at 1999 WL 714667 at *3 (8th Cir. Sept. 15, 1999) (when responding to a motion for summary judgment, nonmoving party must set forth some evidence to demonstrate a genuine fact issue exists for trial); *Jetton v. McDonnell Douglas Corp.*, 121 F.3d 423, 427 (8th Cir. 1997) (when a motion for summary judgment is made, the nonmoving party may not rest on the complaint alone and "must introduce affidavits or other evidence to avoid summary judgment."). Summary judgment in favor of defendants is accordingly granted on Counts VI and VII in their entirety.

D. Scott County Sheriff

Count VIII alleges a section 1983 action against the Sheriff of Scott County. A suit against the Sheriff in his official capacity is a suit against Scott County (the "County"). *See Liebe v. Norton*, 157 F.3d 574, 578 (8th Cir. 1998). In a section 1983 action, a county may be held liable for a constitutional deprivation only if the deprivation is the result of a policy or custom of the county. *Id.* (quoting *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989)). The policy or custom must be "the moving force" behind the alleged constitutional violation. *Rogers v. City of Little Rock*, 152 F.3d 790, 799 (8th Cir. 1998). Although "liability for violating constitutional rights may arise from a single act of a policy maker . . . the act must come from one in an authoritative policy making position and represent the official policy of the municipality." *Miller v. Compton*, 122 F.3d at 1100 (citations and internal quotation marks omitted).

The specific policy, custom, or usage of which plaintiffs complain is stated as: "seizures and other actions were

performed based not only on the writs themselves but also by strict reference to the 'Directions to Sheriff' which was a document unilaterally drafted by private litigants seeking the seizure of other private litigant's property or liberty rights." Amended Complaint, ¶ 131.

Although the Scott County Sheriff's Office used the Directions to Sheriff form to aid in the service of writs and other legal documents, the form cannot be considered a policy, usage, or custom of the Scott County Sheriff's Department that was responsible for the Audio Odyssey lockdown. The Directions merely provided attorney Hofmann a means to put into writing the manner in which he wished the replevin to be carried out. Plaintiffs also misinterpret the Department's policy regarding the Directions to Sheriff form. Deputy Norris testified that his actions were not a result of blind reliance on the Directions form, and that he compared the form with the order to assure consistency between the two. Norris Depo. 22-24. He also indicated that when he faces a Directions Form inconsistent with an order, he follows the order's directive. Norris Depo, 22-24. Plaintiff has not controverted these facts; the Court must therefore consider them accurate.

The Court finds plaintiffs have failed to present any fact issue that a policy or custom of the county was responsible for their alleged constitutional deprivations. The link between the policy of requiring parties to complete a Directions form and the alleged constitutional deprivations is so tenuous that the Court finds no material facts issues exist surrounding the question. The Court therefore grants summary judgment in favor of defendant regarding Count VIII.

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E. Conspiracy

In Count X, plaintiffs allege defendants Brenton Bank, John Bradley, Christopher Pieper, Charles Barton, Michael Bladel, and John Norris conspired to deprive them of constitutional rights. *See* 42 U.S.C. § 1983. This Court has already determined that the Scott County Defendants are entitled to summary judgment on the 42 U.S.C. § 1983 claims alleged against them. Plaintiffs argue the fact that the deputies and Hofmann agreed to lockdown the Audio premises is sufficient to withstand a motion for summary judgment.

From an analytical standpoint, plaintiffs' argument must fail. A section 1983 claim assumes a deprivation of rights, *see Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 435 (7th Cir. 1986), and whether alleged as a conspiracy claim or not as a conspiracy claim, the deprivation of rights element is essential. *See id.* This Court has already determined the Scott County Defendants are not liable for plaintiffs' alleged injuries under section 1983. The "conspiracy" claim presents nothing new; in light of this Court's discussions of the other section 1983 claims against the Scott County Defendants, the conspiracy claim also cannot survive a motion for summary judgment. Summary judgment is granted in favor of the Scott County Defendants on Count X. The other named defendants remain in Count X.

F. Trespass

Iowa Code section 716.7(2)(b) defines trespass as "entering or remaining upon or in property without justification after being notified or requested to abstain from

entering or to remove or vacate therefrom by owner, lessee, or person in lawful possession. . . ." Defendants argue that the Iowa Code exempts them from liability for the trespass claim.

The Iowa Code provides immunity to tort liability in cases of:

> Any claim based upon and act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion be abused.

Iowa Code § 669.14(1). This Court has already determined that Deputy Norris was acting in a discretionary capacity. Therefore, pursuant to section 669.14(1), he is immune from liability. Plaintiffs have presented no evidence that either of the two other Scott County Defendants-Sheriff Bladel or Deputy Barton-trespassed on their land. The Court therefore finds summary judgment in favor of the Scott County Defendants appropriate as to Count XI.

Appendix D

III. ANDERSON & NELSON, P.C., AND ATTORNEY HOFMANN

Count I of plaintiffs' complaint against the Anderson Defendants is a section 1983 claim against Bernard Hofmann, alleging he acted in concert with the Scott County Sheriff's Department to deprive plaintiffs of their constitutional rights. Count II alleges the same against defendant Anderson & Nelson. Count III alleges a conspiracy to deprive plaintiffs of their constitutional rights. Count IV alleges the Iowa replevin statute is unconstitutional, and that defendants used the statute to deprive plaintiffs of their constitutional rights. Count V alleges a state law abuse of process claim against the Anderson Defendants. Defendants seek summary judgment on all counts.

A. Color of Law

The Anderson Defendants argue they are entitled to summary judgment because there are no facts in the record to establish they were acting under color of law, an essential requirement for a section 1983 claim.

"To state a claim under section 1983, a plaintiff must demonstrate that the defendant deprived him /her of a constitutional right while acting under color of state law." *Hassett v. Lemay Bank & Trust Co.*, 851 F.2d 1127, 1129 (8th Cir. 1988) (citations omitted). "Private misuse of a statute by a private actor is not sufficient to state a claim under section 1983." *Hassett*, 851 F.2d at 1129 (citations omitted). Rather, "conduct allegedly causing the deprivation of a federal right [must] be fairly attributable to the State." *Lugar*

v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). The United States Supreme Court has set forth a two-part analysis to determine whether action by a private actor should be considered fairly attributable to the State:

> First the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he acted together with or is a state official, because he acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Lugar, 457 U.S. at 937. Factual disputes involving the misuse of a statute, including the invocation of assistance from state officials, is insufficient to show a private party was acting under color of law. *Hassett v. Lemay Bank & Trust Co.*, 851 F.2d 1127, 1129 (8th Cir. 1998).

"[A] plaintiff seeking to hold a private party liable under § 1983 must allege, at the very least, that there was a mutual understanding, or a meeting of the minds, between the private party and the state actor." *Miller*, 122 F.3d at 1098 (citations omitted). To survive a motion for summary judgment, "evidence must be produced from which reasonable jurors could conclude that such an agreement was come to." *Id.* If a plaintiff fails to establish that a state actor

violated his rights under the Constitution or the laws of the United States, then the plaintiff's claims against private actors must also fail. *See Johnson v. Outboard Marine Corp.*, 172 F.3d at 536.

The Anderson Defendants concede the first part of the analysis has been met, because they invoked state replevin statutes. *See* Defendants' Brief in Support of Motion for Summary Judgment, at 19. They further argue that the evidence presented does not generate a fact issue as to whether there was a meeting of the minds between the Anderson Defendants and the Scott County Sheriff's representatives. Rather, defendants describe the deputies as acting independently of defendants.

Bernard Hofmann sought out the assistance of the Scott County Sheriff's Office in executing the writ of replevin. He requested that they enforce the writ immediately, rather than waiting for the weekend to close. When they suggested that he was unprepared to enforce the writ immediately because he did not have movers and trucks, Hofmann asked the deputies to lock down the Audio Odyssey premises as a means of securing the property over the weekend, and they agreed.

The Court need not reach the issue of whether this activity involved a "meeting of the minds," because this Court has already found plaintiffs did not establish the Scott County Defendants violated plaintiffs' right under the laws of the United States Constitution of the laws of the United States. *See Johnson*, 172 F.3d at 536. The Scott County Defendants are the only state actors alleged to have participated in any

alleged constitutional deprivation with the Anderson Defendants. Therefore, plaintiffs section 1983 claims merely allege private misuse of a state statute, a claim not actionable under section 1983. Summary judgment is therefore granted in favor of the Anderson Defendants regarding Counts I, II and III.

C. Constitutionality of State Statute

A statue is constitutional under the Fourteenth Amendment if it provides procedural protections for any taking of property. *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 611 (1974). "[A] hearing must be had before one is *finally* deprived of his property." *Mitchell.* 416 U.S. at 611 (emphasis added). "The usual rule has been where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate." *Id.* (citations and internal quotation marks omitted).

Courts have distinguished between various types of deprivations and the procedures used to effect them. For example, in *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 324 (1969), the Supreme Court found a prejudgment garnishment procedure unconstitutional. The Court noted that wages are a "specialized type of property presenting distinct problems in our economic system." *Id.* at 340. Because a prejudgment garnishment might "impose tremendous hardship on wage earners with families to support," *id.*, the Court concluded the garnishment procedure required notice to the garnishee and an opportunity to be heard. *Id.* at 324.

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The Supreme Court assessed a statutory replevin procedure in *Fuentes v. Shevin*. 407 U.S. 67 (1972). The statutes at issue in *Fuentes* provided for a summary seizure of goods after a writ was issued ordering state agents to seize the pertinent property. *Id.* at 69-70. The writs could be obtained upon only an ex parte application of any person who claims a right to them and posts a bond. *Id.* Notice and an opportunity to be heard prior to the seizure were not required by the statute. *Id.* The Court found the statute unconstitutional, but noted:

> Our holding, however, is a narrow one. We do not question the power of a State to seize goods before a final judgment in order to protect the security interests of creditors so long as those creditors have tested their claim to the goods through the process of a fair prior hearing. The nature and form of such prior hearings, however, are legitimately open to many potential variations and are a subject, at this point, for legislation-not adjudication. Since the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property, however, it is axiomatic that the hearing must provide a real test. Due process is afforded only by the kinds of notice and hearing that are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property. . . .

Fuentes, 407 U.S. at 96-97 (citations and internal quotation marks omitted).

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The Court addressed the constitutionality of a sequestration procedure, similar to a replevin procedure, in *Mitchell*. 416 U.S. at 601-20. In *Mitchell*, the Supreme Court held the statute constitutional, even though the statute permitted sequestration to occur on the ex parte application of a creditor, without prior notice to the debtor or an opportunity for a hearing. *Id.* at 618-19. The Court distinguished *Sniadach*, noting that the case involved a garnishment statute, for reasons discussed previously in this Order. *Mitchell*, 416 U.S. at 614-15. Addressing *Fuentes*, the Court noted:

> Those statutes permitted the secured installment seller to repossess the goods sold, without notice or hearing and *without judicial order or supervision*, but with the help of the sheriff operating under a writ issued by the court clerk at the behest of the seller. Because carried out without notice or opportunity for hearing and without judicial participation, this kind of seizure was held violative of the Due Process Clause.

Mitchell, 416 U.S. at 615 (emphasis added). The Court noted the procedure had adequate procedural protections, including: a writ of sequestration was available only when the nature of the claim and the amount thereof provided grounds for sequestration by verified affidavit or affidavit, and not through bare conclusory claims of ownership or liens; the requisite showing must be made to a judge, and judicial authorization is required; and the process was under judicial control from start to finish; damages and attorneys fees were available if the writ was wrongfully issued (through the

creditor's bond). The debtor was also permitted to regain possession of the property by putting up his own bond.

The Court notes plaintiffs rely heavily on *Connecticut v. Doehr*, 501 U.S. 1 (1991). The statute at issue permitted prejudgment attachment of real property, without requirement of notice or an opportunity to be heard. The case differs significantly from the instant case, as there was no attachment of the Audio Odyssey premises. Rather, the Audio premises were locked down for a weekend to secure the personal property within; property which a judge had determined Brenton Bank was entitled to possess. Also, the property at issue in *Doehr* was the debtor's home. *See Doehr*, 501 U. S. at 11-12. The attachment of the home in *Doehr* significantly affected the debtor's interests as it could cloud title, impair the ability to sell or otherwise alienate the property, taint his credit ratings, reduce his chances of obtaining a home equity loan or second mortgage, and possibly place an existing mortgage clause in technical default because of an insecurity clause. *Id.* The Court concluded that a prejudgment ex parte attachment without notice and opportunity for hearing required a showing of an exigent circumstance.

The Iowa replevin procedure is similar to that set forth in *Mitchell*. Iowa Code § 643.5 requires a writ to be issued only "[u]pon direction of the court after notice and opportunity for such hearing as it may prescribe. . . ." The creditor is required to file a bond. Iowa Code § 643.6. The debtor may execute a bond to recover the property, pending final adjudication of the matter. Iowa Code § 643.12. The debtor must present a verified petition, stating in pertinent part: a description of the property claimed, its actual

value, and the facts constituting the plaintiff's right to possession and the extent of the plaintiff's interest in the property. Iowa Code § 643.1. The statute does not expressly provide for an immediate post-deprivation hearing, but the Iowa Rules of Civil Procedure permit the debtor to file a motion to void or vacate the writ. *See* Iowa R. Civ. P. 100; *see also* Iowa Code § 643.2 (replevin action is by ordinary proceedings). The debtor may also post bond and have the property immediately returned, as discussed previously. The debtor is entitled to trial by jury. Iowa Code 643.16.

The facts surrounding the replevin were consistent with the replevin statute. Brenton Bank, through its attorneys, filed a verified petition and posted a bond in the amount of $300,000. Notably, Mr. Dincer indicated in his deposition that he had hired an attorney-the one representing him in this action-within three days of July 14, 1995, the date the order and writ were issued. Dincer Depo. at 195. Audio Odyssey did not move to dismiss the replevin action until early August 1995. In noting this, the Court has no intent to question plaintiffs' counsel's strategy or methods; rather, plaintiff repeatedly complains that the premises were locked until late August, 1995, and the Court believes this appears to have occurred at plaintiffs' option. Additionally, Mr. Dincer testified that he could have obtained capital to cover the loan, if the Bank had afforded him an opportunity. Presumably, he could also readily obtain capital to post a bond and regain possession of personal property. Again, this is a post-deprivation option he chose not to exercise. The Court cannot find the replevin procedure unconstitutional simply because plaintiffs made strategic decisions which postponed opportunities to repossess the merchandise.

Under the circumstances, the Court cannot find the Iowa replevin statute unconstitutional facially or as applied. The statute is substantially similar to that held constitutional in *Mitchell*. Additionally, the verified petition indicated exigency, as the Bank was concerned that plaintiffs would dispose of the property (most likely by sale at the retail store) over the weekend. Indeed, the record indicates Mr. Dincer requested the Bank permit the premises to remain open during the weekend because he had a big sale planned. Plaintiffs simply have no sound argument for their claim that the Iowa replevin statute is facially unconstitutional.

The statute is also constitutional as applied. The bank did submit a verified petition, which provides sufficient protection absent misrepresentation or fraud. The fact that the petition may have contained untrue statements (a matter about which the Court makes no evaluation), does not support an "as applied" challenge; rather, such statements are more appropriately attacked through a tort action, or other measures. The Court finds as a matter of law that the Iowa statute is constitutional. Summary judgment in favor of the Anderson Defendants is accordingly granted on Count IV.

D. Abuse of Process

The elements of an abuse of process claim are as follows: legal process; its use in an improper or unauthorized manner; and injury and damage proximately caused as a result of the abuse. *Tomash v. John Deere Indus. Equip. Co.*, 399 N.W. 2d 387, 389 (Iowa 1997). The basis of the tort is "the use of legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it was not

designed." *Palmer v. Tandem Management Servs., Inc., 505* N.W.2d 813, 817 (Iowa 1993). To prove an improper purpose for using the legal process, there must be "some act or threat directed to an immediate objective not legitimate in the use of the process." *Tomash*, 399 N.W.2d at 390 (citation omitted).

Defendants argue there is insufficient evidence to demonstrate defendants used the replevin process for an improper purpose, or one not related to the purpose of the replevin statute. The purpose of the replevin statute is "to restore the property to the party entitled to its immediate possession." *Ankeny Community School Dist. v. Van Gorp*, 501 N.W.2d 506, 507 (Iowa 1993). This is the purpose Hofmann alleges he pursued, and plaintiffs have brought forward absolutely no evidence to the contrary, aside from conclusory allegations. Such allegations are insufficient to survive a motion for summary judgment. *See* Fed. R. Civ. P. 56; *see also Celotex Corp.*, 477 U.S. at 322; *Brandt v. Davis*, __ F.3d __, available at 1999 WL 714667 (8th Cir. September 15, 1999); *Jetton v. McDonnell Douglas* Corp., 121 F.3d at 427. Absent a shred of evidence from plaintiffs to support its claim that the Anderson Defendants acted with an improper purpose, the Court must grant summary judgment in favor of the Anderson Defendants.

Finally, the Anderson Defendants' motion for summary judgment is GRANTED in its entirety. Summary judgment is GRANTED in favor of defendants Bernard Hofmann and Anderson & Nelson, P.C. on Count I (section 1983 claim against Bernard Hofmann), Count II (section 1983 claim against Anderson & Nelson, P.C.), Count III (section 1983

conspiracy claim against the Anderson defendants), and Count IV (unconstitutional state statute) and Count V (abuse of process).

IT IS SO ORDERED.

Dated this 13th day of October, 1999

s/ Ronald E. Longstaff
RONALD E. LONGSTAFF, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX E — CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution:

Amendment IV. Search and Seizure

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apppointment of Representation; Disqualification of Officers; Public Debt; Enforcement

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix E

Statutes:

42 U.S.C. § 1983

> Every person who under color of any statute, ordinance, custom, or usage, of any State or Territory or the District of Columbia, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

* * * *

Appendix E

CODE OF IOWA
1973

Chapter 643 Replevin:

643.1 Where brought — petition. An action of replevin may be brought in any county in which the property or some part thereof is situated. The petition must be verified and must state:

1. A particular description of the property claimed.

2. Its actual value, and, where there are several articles, the actual value of each.

3. The facts constituting the plaintiff's right to the present possession thereof, and the extent of his interest in the property, whether it be full or qualified ownership.

4. That it was neither taken on the order or judgment of a court against the plaintiff, nor under an execution or attachment against him or against the property; but if it was taken by either of these modes, then it must state the facts constituting an exemption from seizure by such process.

5. The facts constituting the alleged cause of detention thereof, according to his best belief.

6. The amount of damages which the affiant believes the plaintiff ought to recover for the detention thereof.

643.2 Ordinary proceedings — joinder or counterclaim. The action shall be by ordinary proceedings, but there shall be no joinder of any cause of action not of the same kind, nor shall there be allowed any counterclaim.

643.3 Process on Sunday. If the plaintiff alleges in his petition that he will lose the property unless process issues on Sunday, the order may be issued and served on that day.

643.4 New parties. If a third person claims the property or any part thereof, the plaintiff may amend and bring him in as a codefendant, or the defendant may obtain the substitution by the proper mode, or the claimant may himself intervene by the process of intervention.

643.5 Bond. When the plaintiff desires the immediate delivery of the property, he shall execute a bond to the defendant, with sureties to be approved by the clerk, in a penalty at least equal to twice the value of the property sought to be taken, conditioned that he will appear in court on or before the day fixed in the original notice, and prosecute his action to judgment, and return the property, if a return is awarded, and pay all costs and damages that may be adjudged against him.

643.6 Filing — purpose of bond. A bond shall be filed with the clerk, and be for the use of any person injured by the proceeding.

643.7 Writ issued. The clerk shall thereupon issue a writ under his hand, and the seal of the court, directed to the proper officer, requiring him to take the property therein described and deliver it to the plaintiff.

643.8 Wrongful removal — service. If the petition shows that the property has been wrongfully removed into another county from the one in which the action is commenced, the writ may issue from the county whence the property was wrongfully taken, and may be served in any county where it may be found.

643.9 Following property — duplicate writs. When any of the property is removed to another county after the commencement of the action, the officer to whom the writ is issued may follow the same and execute the writ in any county of the state where the property is found. For the purpose of following the property, duplicate writs may be issued, if necessary, and served as the original.

643.10 Execution of writ. The officer must forthwith execute the writ by taking possession of the property therein described, if it is found in the possession of the defendant or his agent, or of any other person who obtained possession thereof from the defendant, directly or indirectly, after the writ was placed in the officer's hands, for which purpose he

may break open any dwelling house or other enclosure, having first demanded entrance and exhibited his authority, if demanded.

643.11 Defendant examined. When it appears by affidavit that the property claimed has been disposed of or concealed so that the writ cannot be executed, the court upon verified petition therefor, may compel the attendance of the defendant or other person claiming or concealing the property, and examine him on oath as to the situation of the property, and punish a willful obstruction or hindrance or disobedience of the order of the court in this respect as in case of contempt.

643.12 Delivery bond. The officer, having taken the property or any part thereof, shall forthwith deliver the same to the plaintiff, unless, before the actual delivery to the plaintiff, the defendant executes a bond to the plaintiff, with sureties to be approved by the clerk or officer, conditioned that the defendant will appear in and defend the action, and deliver the property to the plaintiff, if he recovers judgment therefor, in as good condition as it was when the action was commenced, and that he will pay all costs and damages that may be adjudged against him for the taking or detention of the property.

643.13 Release — return of bond. Said bond shall be delivered to the officer, who shall return the property to the defendant, append the bond to the writ, return it therewith to the officer issuing it, and refer thereto in his return on the writ.

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643.14 Inspection — appraisement. When the property is so retained by the defendant, he shall permit the officer and plaintiff to inspect the same, and, if the plaintiff so requests, the officer shall cause it to be examined and appraised by two sworn appraisers chosen by the parties to the action, or, in their default, by the officer himself, in the manner provided for other cases of appraisement, and in case they cannot agree he shall select a third, and an appraisement agreed to by two of them shall be sufficient, and the officer shall return their appraisement with the writ.

643.15 Return of writ. The officer must return the writ within sixty days after its issuance or at an earlier time if the court shall order, and shall state fully what he has done thereunder. If he has taken any property, he shall describe the same particularly.

643.16 Assessment of value and damages — right of possession. The jury must assess the value of the property and the damages for the taking or detention thereof, whenever by their verdict there will be a judgment for the recovery or the return of the property, and, when required so to do by either party, must find the value of each article, and find which is entitled to the possession, designating his right therein, and the value of such right.

643.17 Judgment. The judgment shall determine which party is entitled to the possession of the property, and shall designate the party's right therein, and if such party have not the possession thereof, shall also determine the value of the right of such party, which right shall be absolute as to an

adverse party, and shall also award such damages to either party as he may be entitled to for the illegal detention thereof. If the judgment be against the plaintiff for the money value of the property, it shall also be against the sureties on his bond.

643.18 Execution. The execution shall require the officer to deliver the possession of the property, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, or rents and profits, with interest, recovered by the same judgment, out of the property of the party against whom it was rendered, subject to execution, and the value of the property for which judgment was recovered to be specified therein if a delivery thereof cannot be had, and shall in that respect be deemed an execution against property.

643.19 Plaintiff's option. If the party found to be entitled to the property be not already in possession thereof by delivery under the provisions of this chapter or otherwise, he may at his option have an execution for the delivery of the specific property, or for the value thereof as determined by the jury, and if any article of the property cannot be obtained on execution, he may take the remainder, with the value of the missing articles.

643.20 Judgment on bond. When property for which a bond has been given as hereinbefore provided is not forthcoming to answer the judgment, and the party entitled thereto so elects, a judgment may be entered against the principal and sureties in the bond for its value.

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643.21 Concealment. When it appears by the return of the officer or by the affidavit of the plaintiff that any specific property which has been adjudged to belong to one party has been concealed or removed by the other, the court may require him to attend and be examined on oath respecting such matter, and may enforce its order in this respect as in case of contempt.

643.22 Exemption. A money judgment rendered under the provisions of this chapter for property exempt from execution shall also be to the same extent exempt from execution, and from all setoff or diminution by any person, which exemption may, at the election of the party in interest, be stated in the judgment.

Appendix E

CODE OF IOWA
1975

Chapter 643 Replevin:

643.1 Where brought — petition. An action of replevin may be brought in any county in which the property or some part thereof is situated. The petition must be verified and must state:

1. A particular description of the property claimed.

2. Its actual value, and, where there are several articles, the actual value of each.

3. The facts constituting the plaintiff's right to the present possession thereof, and the extent of his interest in the property, whether it be full or qualified ownership.

4. That it was neither taken on the order or judgment of a court against the plaintiff, nor under an execution or attachment against him or against the property; but if it was taken by either of these modes, then it must state the facts constituting an exemption from seizure by such process.

5. The facts constituting the alleged cause of detention thereof, according to his best belief.

6. The amount of damages which the affiant believes the plaintiff ought to recover for the detention thereof.

643.2 Ordinary proceedings — joinder or counterclaim. The action shall be by ordinary proceedings, but there shall be no joinder of any cause of action not of the same kind, nor shall there be allowed any counterclaim.

643.3 Process on Sunday. If the plaintiff alleges in his petition that he will lose the property unless process issues on Sunday, the order may be issued and served on that day.

643.4 New parties. If a third person claims the property or any part thereof, the plaintiff may amend and bring him in as a codefendant, or the defendant may obtain the substitution by the proper mode, or the claimant may himself intervene by the process of intervention.

643.5 Writ issued. Upon direction of the court after notice and opportunity for such hearing as it may prescribe, the clerk shall issue a writ under the clerk's hand, and the seal of the court, directed to the proper officer, requiring him to take the property therein described and deliver it to the plaintiff.

643.6 Filing — purpose of bond. A bond shall be filed with the clerk, and be for the use of any person injured by the proceeding.

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643.7 Bond. When the plaintiff desires the immediate delivery of the property, he shall execute a bond to the defendant, with sureties to be approved by the clerk, in a penalty at least equal to twice the value of the property sought to be taken, conditioned that he will appear in court on or before the day fixed in the original notice, and prosecute his action to judgment, and return the property, if a return is awarded, and pay all costs and damages that may be adjudged against him.

643.8 Wrongful removal — service. If the petition shows that the property has been wrongfully removed into another county from the one in which the action is commenced, the writ may issue from the county whence the property was wrongfully taken, and may be served in any county where it may be found.

643.9 Following property — duplicate writs. When any of the property is removed to another county after the commencement of the action, the officer to whom the writ is issued may follow the same and execute the writ in any county of the state where the property is found. For the purpose of following the property, duplicate writs may be issued, if necessary, and served as the original.

643.10 Execution of writ. The officer must forthwith execute the writ by taking possession of the property therein described, if it is found in the possession of the defendant or his agent, or of any other person who obtained possession thereof from the defendant, directly or indirectly, after the writ was placed in the officer's hands, for which purpose he

may break open any dwelling house or other enclosure, having first demanded entrance and exhibited his authority, if demanded.

643.11 Defendant examined. When it appears by affidavit that the property claimed has been disposed of or concealed so that the writ cannot be executed, the court upon verified petition therefor, may compel the attendance of the defendant or other person claiming or concealing the property, and examine him on oath as to the situation of the property, and punish a willful obstruction or hindrance or disobedience of the order of the court in this respect as in case of contempt.

643.12 Delivery bond. The officer, having taken the property or any part thereof, shall forthwith deliver the same to the plaintiff, unless, before the actual delivery to the plaintiff, the defendant executes a bond to the plaintiff, with sureties to be approved by the clerk or officer, conditioned that the defendant will appear in and defend the action, and deliver the property to the plaintiff, if he recovers judgment therefor, in as good condition as it was when the action was commenced, and that he will pay all costs and damages that may be adjudged against him for the taking or detention of the property.

643.13 Release — return of bond. Said bond shall be delivered to the officer, who shall return the property to the defendant, append the bond to the writ, return it therewith to the officer issuing it, and refer thereto in his return on the writ.

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643.14 Inspection — appraisement. When the property is so retained by the defendant, he shall permit the officer and plaintiff to inspect the same, and, if the plaintiff so requests, the officer shall cause it to be examined and appraised by two sworn appraisers chosen by the parties to the action, or, in their default, by the officer himself, in the manner provided for other cases of appraisement, and in case they cannot agree he shall select a third, and an appraisement agreed to by two of them shall be sufficient, and the officer shall return their appraisement with the writ.

643.15 Return of writ. The officer must return the writ within sixty days after its issuance or at an earlier time if the court shall order, and shall state fully what he has done thereunder. If he has taken any property, he shall describe the same particularly.

643.16 Assessment of value and damages — right of possession. The jury must assess the value of the property and the damages for the taking or detention thereof, whenever by their verdict there will be a judgment for the recovery or the return of the property, and, when required so to do by either party, must find the value of each article, and find which is entitled to the possession, designating his right therein, and the value of such right.

643.17 Judgment. The judgment shall determine which party is entitled to the possession of the property, and shall designate the party's right therein, and if such party have not the possession thereof, shall also determine the value of the right of such party, which right shall be absolute as to an adverse party, and shall also award such damages to either

party as he may be entitled to for the illegal detention thereof. If the judgment be against the plaintiff for the money value of the property, it shall also be against the sureties on his bond.

643.18 Execution. The execution shall require the officer to deliver the possession of the property, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, or rents and profits, with interest, recovered by the same judgment, out of the property of the party against whom it was rendered, subject to execution, and the value of the property for which judgment was recovered to be specified therein if a delivery thereof cannot be had, and shall in that respect be deemed an execution against property.

643.19 Plaintiff's option. If the party found to be entitled to the property be not already in possession thereof by delivery under the provisions of this chapter or otherwise, he may at his option have an execution for the delivery of the specific property, or for the value thereof as determined by the jury, and if any article of the property cannot be obtained on execution, he may take the remainder, with the value of the missing articles.

643.20 Judgment on bond. When property for which a bond has been given as hereinbefore provided is not forthcoming to answer the judgment, and the party entitled thereto so elects, a judgment may be entered against the principal and sureties in the bond for its value.

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643.21 Concealment. When it appears by the return of the officer or by the affidavit of the plaintiff that any specific property which has been adjudged to belong to one party has been concealed or removed by the other, the court may require him to attend and be examined on oath respecting such matter, and may enforce its order in this respect as in case of contempt.

643.22 Exemption. A money judgment rendered under the provisions of this chapter for property exempt from execution shall also be to the same extent exempt from execution, and from all setoff or diminution by any person, which exemption may, at the election of the party in interest, be stated in the judgment.

Appendix E

CODE OF IOWA
1995

Chapter 643 Replevin:

643.1 Where brought — petition.

An action of replevin may be brought in any county in which the property or some part thereof is situated. The petition must be verified and must state:

1. A particular description of the property claimed.

2. Its actual value, and, where there are several articles, the actual value of each.

3. The facts constituting the plaintiff's right to the present possession thereof, and the extent of his interest in the property, whether it be full or qualified ownership.

4. That it was neither taken on the order or judgment of a court against the plaintiff, nor under an execution or attachment against him or against the property; but if it was taken by either of these modes, then it must state the facts constituting an exemption from seizure by such process.

5. The facts constituting the alleged cause of detention thereof, according to his best belief.

6. The amount of damages which the affiant believes the plaintiff ought to recover for the detention thereof.

643.2 Ordinary proceedings — joinder or counterclaim.

The action shall be by ordinary proceedings, but there shall be no joinder of any cause of action not of the same kind, nor shall there be allowed any counterclaim.

643.3 Process on Sunday.

If the plaintiff alleges in his petition that he will lose the property unless process issues on Sunday, the order may be issued and served on that day.

643.4 New parties.

If a third person claims the property or any part thereof, the plaintiff may amend and bring him in as a codefendant, or the defendant may obtain the substitution by the proper mode, or the claimant may himself intervene by the process of intervention.

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643.5 Writ issued.

Upon direction of the court after notice and opportunity for such hearing as it may prescribe, the clerk shall issue a writ under the clerk's hand, and the seal of the court, directed to the proper officer, requiring him to take the property therein described and deliver it to the plaintiff.

643.6 Filing — purpose of bond.

A bond shall be filed with the clerk, and be for the use of any person injured by the proceeding.

643.7 Bond.

When the plaintiff desires the immediate delivery of the property, he shall execute a bond to the defendant, with sureties to be approved by the clerk, in a penalty at least equal to twice the value of the property sought to be taken, conditioned that he will appear in court on or before the day fixed in the original notice, and prosecute his action to judgment, and return the property, if a return is awarded, and pay all costs and damages that may be adjudged against him.

643.8 Wrongful removal — service.

If the petition shows that the property has been wrongfully removed into another county from the one in which the action is commenced, the writ may issue from the county whence the property was wrongfully taken, and may be served in any county where it may be found.

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643.9 Following property — duplicate writs.

When any of the property is removed to another county after the commencement of the action, the officer to whom the writ is issued may follow the same and execute the writ in any county of the state where the property is found. For the purpose of following the property, duplicate writs may be issued, if necessary, and served as the original.

643.10 Execution of writ.

The officer must forthwith execute the writ by taking possession of the property therein described, if it is found in the possession of the defendant or his agent, or of any other person who obtained possession thereof from the defendant, directly or indirectly, after the writ was placed in the officer's hands, for which purpose he may break open any dwelling house or other enclosure, having first demanded entrance and exhibited his authority, if demanded.

643.11 Defendant examined.

When it appears by affidavit that the property claimed has been disposed of or concealed so that the writ cannot be executed, the court upon verified petition therefor, may compel the attendance of the defendant or other person claiming or concealing the property, and examine him on oath as to the situation of the property, and punish a willful obstruction or hindrance or disobedience of the order of the court in this respect as in case of contempt.

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643.12 Delivery bond.

The officer, having taken the property or any part thereof, shall forthwith deliver the same to the plaintiff, unless, before the actual delivery to the plaintiff, the defendant executes a bond to the plaintiff, with sureties to be approved by the clerk or officer, conditioned that the defendant will appear in and defend the action, and deliver the property to the plaintiff, if he recovers judgment therefor, in as good condition as it was when the action was commenced, and that he will pay all costs and damages that may be adjudged against him for the taking or detention of the property.

643.13 Release — return of bond.

Said bond shall be delivered to the officer, who shall return the property to the defendant, append the bond to the writ, return it therewith to the officer issuing it, and refer thereto in his return on the writ.

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When the property is so retained by the defendant, he shall permit the officer and plaintiff to inspect the same, and, if the plaintiff so requests, the officer shall cause it to be examined and appraised by two sworn appraisers chosen by the parties to the action, or, in their default, by the officer himself, in the manner provided for other cases of appraisement, and in case they cannot agree he shall select a third, and an appraisement agreed to by two of them shall be sufficient, and the officer shall return their appraisement with the writ.

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The jury must assess the value of the property and the damages for the taking or detention thereof, whenever by their verdict there will be a judgment for the recovery or the return of the property, and, when required so to do by either party, must find the value of each article, and find which is entitled to the possession, designating his right therein, and the value of such right.

643.17 Judgment.

The judgment shall determine which party is entitled to the possession of the property, and shall designate the party's right therein, and if such party have not the possession thereof, shall also determine the value of the right of such party, which right shall be absolute as to an adverse party, and shall also award such damages to either party as he may be entitled to for the illegal detention thereof. If the judgment be against the plaintiff for the money value of the property, it shall also be against the sureties on his bond.

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643.18 Execution.

The execution shall require the officer to deliver the possession of the property, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, or rents and profits, with interest, recovered by the same judgment, out of the property of the party against whom it was rendered, subject to execution, and the value of the property for which judgment was recovered to be specified therein if a delivery thereof cannot be had, and shall in that respect be deemed an execution against property.

643.19 Plaintiff's option.

If the party found to be entitled to the property be not already in possession thereof by delivery under the provisions of this chapter or otherwise, he may at his option have an execution for the delivery of the specific property, or for the value thereof as determined by the jury, and if any article of the property cannot be obtained on execution, he may take the remainder, with the value of the missing articles.

643.20 Judgment on bond.

When property for which a bond has been given as hereinbefore provided is not forthcoming to answer the judgment, and the party entitled thereto so elects, a judgment may be entered against the principal and sureties in the bond for its value.

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643.21 Concealment.

When it appears by the return of the officer or by the affidavit of the plaintiff that any specific property which has been adjudged to belong to one party has been concealed or removed by the other, the court may require him to attend and be examined on oath respecting such matter, and may enforce its order in this respect as in case of contempt.

643.22 Exemption.

A money judgment rendered under the provisions of this chapter for property exempt from execution shall also be to the same extent exempt from execution, and from all setoff or diminution by any person, which exemption may, at the election of the party in interest, be stated in the judgment.

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IOWA
RULES OF COURT

STATE AND FEDERAL
1995

RULE 49. ORIGINAL NOTICE; ISSUANCE AND FORM

(a) Written directions for the service of the original notice and copy of petition shall be delivered to the clerk with the petition. There shall also be delivered to the clerk with the petition the original notice to be served and sufficient copies of both. The original notice shall contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to serve, and within a reasonable time thereafter file, a motion or answer, and shall notify the defendant that in case of the defendant's failure to do so, judgment by default will be rendered against the defendant for the relief demanded in the petition. Except in small claims and cases involving only liquidated damages, the original notice shall not state the amount of any money damages claimed.

(b) Upon the filing of the petition the clerk shall forthwith deliver for service the original notice and copies, copies of the petition, and the directions for service to the sheriff, to a person specially appointed to serve it, or other appropriate person. Upon request of the plaintiff, separate or additional original notices shall issue against any defendants.

(c) The original notice shall be signed by the clerk and be under the seal of the court. The clerk may require the party delivering the original notice to the clerk to advance reasonable costs of service.

RULE 50. SERVING COPIES OF ORIGINAL NOTICE AND PETITION

The original notice and copy of petition shall be served together except when service is by publication. If service is by publication the original notice alone shall be published and shall also contain a general statement of the claim or claims and, subject to the limitation in R.C.P. 69(a), the relief demanded.

RULE 82. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(a) When Service Required. Everything required by these rules to be filed, every order required by its terms to be served, every pleading subsequent to the original petition unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties. No service need be made on any party against whom a default has been entered except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of original notice in R.C.P. 56.1.

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In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

* * *

(g) Proof of Service. Proof of service of all papers required or permitted to be served shall be filed in the clerk's office promptly, and, in any event, before action is to be taken thereon by the court or the parties. The proof shall show the time and manner of service and the names and addresses of the persons served. The proof may be by written acknowledgment of service, by certification of the person who served the papers, or by any other proof satisfactory to the court.

Supreme Court U.S.
FILED
SEP 16 2002
OFFICE OF THE CLERK

No. 02-88

IN THE

Supreme Court of the United States

AUDIO ODYSSEY, LTD., DOGAN A. DINCER, and ANN M. DINCER,

Petitioners,

v.

BRENTON FIRST NATIONAL BANK, an Iowa Banking Corporation, MICHAEL M. BLADEL, Sheriff of Scott County, Iowa, JOHN M. NORRIS, Deputy Sheriff of Scott County, Iowa, CHARLES A. BARTON, Deputy Sheriff of Scott County, Iowa, JOHN C. BRADLEY, CHRIS A. PIEPER, MERCHANTS BONDING COMPANY (Mutual), BERNARD J. HOFMANN, and ANDERSON & NELSON, P.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

30 pp

STATEMENT PURSUANT TO RULE 29.6

Respondent Brenton First National Bank is a wholly owned subsidiary of Wells Fargo and Company.

None of the remaining Respondents has a parent company and no publicly held company owns 10% or more of the stock of either such respondent.

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STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

This case arises from a replevin action executed against Petitioner,[1] Audio Odyssey, an Iowa electronics store. On July 14, 1995, a writ of replevin was obtained in Scott County, Iowa district court by attorney Bernard J. Hofmann, on behalf of Brenton First National Bank. The writ was executed by the Scott County Sheriff's Department. Audio Odyssey Ltd., and Dogan and Ann Dincer, as Plaintiffs, filed two separate actions arising from the execution of the writ of replevin. Both complaints were filed in the United States district court for the northern district of Iowa. One cause of action was against Bernard J. Hofmann and Anderson & Nelson P.C. (Law Firm Defendants). The other cause was against Brenton First National Bank, two Brenton Bank employees and Brenton's bonding company (collectively the Bank), the Sheriff of Scott County and two sheriff's deputies (Scott County Defendants), and Roger Hoffman, a loan officer for the Small Business Association (United States Defendant). The district court granted Roger Hoffman's motion to dismiss by order filed December 15, 1997. The district court also dismissed the Dincers' individual claims against the Law Firm Defendants for lack of standing by order filed December 15, 1997. The district court dismissed the Dincers' individual claims against the Scott County Defendants for lack of standing by order filed June 2, 1998. The two cases were consolidated on motion of Audio Odyssey and the Dincers on June 30, 1999.

---

1. Petitioner refers to "Petitioners," which would include Dogan S. Dincer and Ann M. Dincer. The individual Plaintiffs were dismissed; the only proper Petitioner is accordingly Audio Odyssey.

Petitioner's complaint included claims against all parties for unconstitutional deprivation of property pursuant to 42 U.S.C. § 1983. Additionally, Petitioner alleged the unconstitutionality of the Iowa replevin statute. The complaint also included state law claims, including trespass, conversion, abuse of process, tortious interference with contractual relations, failure of the Bank to act in a commercially reasonable manner, and other Uniform Commercial Code claims.

All defendants moved for summary judgment. By order filed October 13, 1999, the district court granted the Scott County Defendants' and the Law Firm Defendants' motions for summary judgment on all counts. The district court ruled Audio Odyssey and the individual Plaintiffs were not deprived of any constitutional rights, that the Scott County Defendants were entitled to good faith immunity, and that Audio Odyssey had failed to establish any cause of action against these Defendants. The district court further found the Iowa replevin statute constitutional both facially and as applied. By order filed January 21, 2000, the district court granted the Bank's motion for summary judgment on all federal claims and declined to exercise supplemental jurisdiction over the remaining state law claims. Judgment was entered in favor of all Defendants on January 25, 2000.

Audio Odyssey appealed the order of the district court. By a decision filed April 6, 2001 (hereinafter panel decision), the Eighth Circuit Court of Appeals, before Loken and Bye, circuit judges, and Sachs, district judge, affirmed in part, reversed in part, and remanded for further proceedings. The panel decision affirmed the district court's finding that the Dincers lack individual standing to sue. It affirmed the

constitutionality of the Iowa replevin statute and affirmed the finding that the seizure of Petitioner's personal property comported with due process. The panel decision reversed the district court's grant of summary judgment on Petitioner's section 1983 claims and good faith immunity. The panel decision affirmed the grant of summary judgment on all other counts. All parties petitioned for a rehearing en banc. Defendants' petition was granted. The April 10, 2002, en banc reconsideration by the Eighth Circuit reinstated the panel decision in all respects, further clarifying that the initial execution of the writ of replevin was constitutional. The court held, en banc, however, the continued holding of the real property may be an unconstitutional deprivation and this issue was remanded to the district court for further proceedings.

B. STATEMENT OF THE FACTS

On July 14, 1995, Bernard J. Hofmann, as attorney for the Bank, filed a petition for writ of replevin requesting the seizure of property from the business, Audio Odyssey Ltd. He appeared before a Scott County, Iowa District Court judge, who entered a replevin order. A bond was posted in accordance with Iowa Code Chapter 643 on behalf of the Bank. The clerk of court issued a writ of replevin.

Attorney Hofmann took the writ of replevin to the Scott County sheriff's department and spoke with Sergeant Charles A. Barton. Hofmann requested service of the writ and that a deputy be sent to Audio Odyssey, meet with bank officer, John C. Bradley, and seize the property immediately. The writ "ordered and commanded" the Sheriff of Scott County to take from the possession of Audio Odyssey, Ltd., and deliver into the possession of Brenton First National

Bank "all inventory, fixtures, accounts, furniture, equipment and machinery on property described as follows:

> 4,050 square feet located at 1718 E. Kimberly Road, Davenport, Iowa, legally described as: Part of the Northwest Quarter of the Southwest Quarter of Section 18, Township 78, Range 4, East of the 5th P.M. . . . to the City of Davenport, Scott County, Iowa.

Attorney Hofmann completed a "Directions to Sheriff' form, directing the Sheriff: "if possible serve Dogan Dincer, President of Corporation — contact John Bradley at Brenton Bank, 323-3368 — he will meet you at store with a locksmith."

At approximately 4 p.m. on July 14, 1995, Scott County Sheriff's Deputy John Norris was dispatched to Audio Odyssey to serve the writ of replevin. He met with the Bank's representative, John Bradley. Before serving the writ, Deputy Norris read the replevin order and writ, and then compared them with the directions to sheriff in an effort to determine the items and method of seizure.

Deputy Norris then went to the location and served Dogan Dincer, President of Audio Odyssey, with the order and writ of replevin. At the store, a locksmith hired by the Bank was waiting. Deputy Norris requested all employees to leave the premises after allowing them to gather their personal belongings. Deputy Norris then allowed the locksmith to change the locks, thereby securing the store.

The following week, all of the property on the premises, furniture, equipment and machinery, were inventoried,

removed and turned over to the Bank in the care of John C. Bradley. Although Audio Odyssey had an attorney at all material times, and apparently consulted with many other attorneys, it did not pursue any procedural nor statutory protections to resist or halt the replevin action until August 4, 1995, when it moved to dismiss the replevin action. The state court replevin action was subsequently settled by Audio Odyssey and the Bank and dismissed. Petitioner subsequently filed lawsuits as described in the "Course of Proceedings" above.

C. PERCEIVED MISSTATEMENTS OF FACT IN PETITION

Petitioner's "Statement of the Case" is argumentative. Many of the issues raised do not pertain to the Petition for Writ of Certiorari. Other statements misrepresent the facts.

At page two of the Petition, Petitioner states, "the bank through its attorney, directed the Sheriff's deputies to seize the real property itself and locked the plaintiffs out of their business which the deputies did." At no point did anyone direct the deputies to "seize real property." The locks were changed on the building as a method to secure the attached property until it could be inventoried and removed. The writ of replevin was extensive, requiring seizure of "all inventory, fixtures, accounts, furniture, equipment and machinery on property described as follows: [legal description of the real estate]." The locking of the building was a method for attaching the personal property. Although the practical effect may be the same, it was never the intent of any party to knowingly seize the real estate.

At page two, Petitioner states: "No original notice was issued by the replevin plaintiffs and served on the replevin defendants until almost one month after the ex parte seizure." The issue of documents that were served is in dispute. Discrepancies exist as to the method and nature of documents served.

Petitioner states, at page three "42 U.S.C. § 1983 allows for causes of action whenever plaintiffs are deprived of constitutional rights under color of state law, which clearly occurred here." This statement is argumentative, and disputed by Respondents. The decision that the issuance of the writ of replevin and its initial execution was constitutional has been affirmed by the Eighth Circuit Court of Appeals.

Respondents dispute Petitioner's description of the Eighth Circuit's opinion as contained in the second paragraph on page three. This issue was remanded for further proceedings.

The third paragraph on page three of the Petition is not a fact statement. It is a legal argument disputed by Respondents.

Respondents dispute the statement in the last paragraph on page three of the Petition and continuing on page four pertaining to the underlying events leading to the replevin action. Prior to the replevin petition being filed, the Bank had concerns that the Small Business Association loan was being used improperly, including for payment of delinquent taxes. In addition, Dogan Dincer was continually writing checks on the Audio Odyssey account when there were not sufficient funds in the account. Audio Odyssey was in default on its loan. The Bank was concerned that collateral for the loan was at risk. The Bank had received a notice that the

insurance policy on the collateral had been cancelled. It also received a copy of a letter from Audio Odyssey's consultant criticizing Dincer for "willful disregard for commonly accepted business principles."

The last paragraph on page five of the Petition states only part of the facts. Although Audio Odyssey had procedural remedies available, including the posting of a bond to halt the replevin and motion practice pursuant to the Iowa Rules of Civil Procedure, no such actions were taken by Petitioner until almost three weeks after the execution of the replevin. Petitioner's failure to act has never been explained.

Petitioner states in the last paragraph on page five "the Bank, *in effect*, (emphasis added) admitted that there was no exigent circumstances justifying the ex parte replevin." This statement is argumentative and misstates the facts as no such admission has been made by the Bank.

REASONS FOR DENYING THE WRIT

I.

THE COURT SHOULD DECLINE TO EXERCISE CERTIORARI JURISDICTION IN THIS CASE BECAUSE PETITIONER WAS THE SUCCESSFUL PARTY IN THE EIGHTH CIRCUIT COURT OF APPEALS AND THERE IS NO COMPELLING REASON TO DO SO

Although Petitioner fails to make it clear in its Petition, Audio Odyssey was the successful party in the Eighth Circuit. The Court of Appeals in *Audio Odyssey, Ltd. v. Brenton First National Bank*, 286 F.3d 498 (8th Cir. 2002), sitting *en banc*, held, in a plurality decision, that the county Respondents, pursuant to 42 U.S.C. § 1983, violated Audio Odyssey's Fourth Amendment right to be free from illegal seizure. In doing so, the Court of Appeals reinstated the panel decision, *Audio Odyssey, Ltd. v. Brenton First Nat'l Bank*, 245 F.3d 721 (8th Cir. 2001), which had reversed the district court's grant of summary judgment as to all Respondents.[2] The Eighth Circuit Court of Appeals remanded the case for a trial on the merits.

2. The panel decision held as follows: (1) the individual Plaintiffs, shareholders of Audio Odyssey, did not have standing to seek redress for emotional and reputational injuries that they sustained as result of the Bank's alleged wrongful ex parte seizure; (2) the Iowa replevin statute did not violate due process either on its face or as applied; (3) the seizure of debtor's real property that occurred, when officers acting pursuant to writ of replevin that authorized them to seize specific items of personal property from debtor's store had entered premises, ordered those inside to leave, and arranged for locks to be changed, violated Fourth Amendment; (4) officers were not entitled to qualified immunity; (5) loan officer who had authorized the Bank to accelerate loan and seek replevin was not liable under § 1983; and (6) county and county sheriff were likewise not liable, on failure to train theory, for Fourth Amendment violation. *See Audio Odyssey, Ltd.*, 245 F.2d at 721-739.

Although 28 U.S.C. § 1254(1) permits "any party" to a case in the Court of Appeals to apply for a writ of certiorari, it would be a waste of judicial resources for this Court to grant certiorari where the Petitioner has received its requested relief, i.e., a trial on the merits and the opportunity to seek damages. This Court has, on a number of occasions, declined to exercise its appeal jurisdiction where the party seeking relief has received that which was sought in the Court of Appeals. *See Deposit Guaranty National Bank v. Roper*, 45 U.S. 326, 333 (1980) (holding that party in lower court who received all that he has sought is generally not aggrieved by a final judgment and therefore cannot appeal it). *See also Public Service Commission v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939) (holding successful party below had no standing to appeal from an order denying an injunction.). Given the discretionary nature of certiorari review, and the limitations of Supreme Court Rule 10, which provides that "[a] petition for writ of certiorari will be granted only for compelling reasons," the Court should decline to exercise its certiorari jurisdiction where Petitioner has prevailed, the case has been remanded, and Petitioner has the opportunity to seek relief and damages.[3]

Finally, Petitioner is seeking certiorari prior to final judgment. As this Court stated in *American Construction Co. v. Jacksonville, T & K.R. Co.*, 148 U.S. 372, 384 (1893), the Supreme Court should decline to issue a writ of certiorari prior to final judgment "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *See also Brotherhood of Locomotive*

3. Indeed "it would appear that there is no reported case where the court has . . . granted a petition filed by a party who prevailed on the merits in the Court of Appeals." R. Stern, E. Gressman, S. Shapiro & K. Gellar, Supreme Court Practice 45 (7th Ed. 1993).

Firemen v. Bangor & Aroostock R. Co., 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case [and thus] is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (certiorari jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision . . . And, except in extraordinary cases, the writ is not issued until final decree.") Here, the case has been remanded to the district court for a determination on the merits of Petitioner's claims.[4] Accordingly, the Court should decline to exercise its certiorari jurisdiction and dismiss the Petition.

II.

THE PETITION SHOULD BE DENIED BECAUSE THIS CASE DOES NOT SATISFY THE CRITERIA SET OUT IN RULE 10 CONCERNING GROUNDS FOR EXERCISING CERTIORARI JURISDICTION

Petitioner suggests the Iowa replevin statute conflicts with the U.S. Supreme Court's decision in *Fuentes v. Shevin*, 407 U.S. 67 (1972) and the Iowa Supreme Court's decision in *Thorp Credit, Inc. v. Barr*, 200 N.W.2d 535 (Iowa 1972). In particular, Petitioner asserts the statute is invalid because it allows the *ex parte* issuance of a prejudgment replevin writ without service of an original notice. Petitioner also

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4. Therefore the case is not "in" the Court of Appeals, which is essential for certiorari jurisdiction pursuant to 28 U.S.C. § 1254(1), which is the jurisdiction Petitioner has invoked. *See Douglas Oil of California v. Petrol Stops Northwest*, 441 U.S. 211 (1979) (explaining that in order for Supreme Court to have jurisdiction pursuant to Section 1254, the case must be "in" the Court of Appeals).

argues without citation, the statute is defective because it does not require a prompt post-deprivation hearing; the replevin defendant cannot post bond after the turnover of property to the replevin plaintiff; and the replevin plaintiff may dismiss its case prior to final judgment. Petitioner's arguments are without merit.

A. The Opinion of the Court of Appeals Holding that the Iowa Replevin Statute is Constitutional is Consistent with Supreme Court Cases Concerning Prejudgment Repossession Remedies.

As Petitioner correctly points out, the current Iowa replevin statute was enacted in 1972 to correct constitutional defects made apparent by the Supreme Court's decision in *Fuentes*. In 1986, the Iowa Supreme Court noted the post-*Fuentes* statute meets the requirements of due process. *See Interfirst Bank of Dallas v. Hanson*, 395 N.W.2d 857, 860 (Iowa 1986).

The Iowa replevin scheme also satisfies constitutional requirements under *Fuentes'* progeny. In *Fuentes*, the Court invalidated two state replevin laws allowing the summary seizure of household goods and chattel upon a private party's mere *ex parte* application and posting of a bond. *Fuentes*, 407 U.S. at 69-70, 96. Although the statutes allowed the defendants to request a post-seizure hearing, the Court concluded the statutes lacked adequate due process in that prejudgment repossession was allowed without notice, hearing, or judicial supervision. *Id.* at 93. A party only had to make a request to the court clerk, who could issue a writ to be executed by the sheriff. *Id.*

Two years after *Fuentes*, the Court clarified both its holding in *Fuentes* and the requirements of the due process clause in the context of a pre-judgment remedy. In *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), the Court held the due process clause was not violated by a Louisiana statute allowing the issuance of a sequestration writ to recover household goods *without* notice and hearing. The Court noted that unlike the statutes considered in *Fuentes*, the Louisiana law incorporated the following procedural protections: (1) the party seeking issuance of the writ could not rely on bare, conclusory claims of ownership but had to make specific allegations showing its entitlement to the writ in a verified petition; (2) the requisite showing had to be made to a judge and judicial authorization obtained; and (3) a sufficient bond had to be filed by the party to protect the debtor against all damages should the sequestration have been improper. *See Mitchell*, 416 U.S. at 616-17. The Court also noted the Louisiana law permitted the debtor to regain possession of the property by putting up his own bond and entitled the debtor to an immediate postdeprivation hearing following execution of the writ. *Id.* at 618. In *Mitchell*, the Court reiterated the principle that due process requirements are neither "technical" nor necessitate any "particular form of procedure," and that creditor remedy schemes must be considered "as a whole." *Id.* at 610.

The year after the Court decided *Mitchell*, the Court considered the constitutionality of yet another state prejudgment remedy law. In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), the Court invalidated a Georgia statute allowing the issuance of a writ of garnishment by a court clerk. *Id.* at 607. The Court noted that unlike the Louisiana law upheld in *Mitchell*, the Georgia statute did not require judicial participation and allowed the

writ to be issued upon an affidavit containing only conclusory allegations. *Id.* Also, the debtor could not challenge the garnishment, in a postdeprivation hearing or otherwise, without first filing a bond. *Id.* The Court identified the "saving characteristics" of a prejudgment remedy statute to include the following requirements: (1) a verified petition showing facts, rather than conclusory allegations, supporting the replevin action; (2) judicial oversight, where the application was presented without notice; (3) the posting of a bond; and (4) entitlement by the debtor to an immediate hearing on the issue of possession. *Id.* at 605-607.

B. The Iowa Replevin Statute Provides the Due Process Safeguards Required by *Fuentes* and its Progeny.

As the Eighth Circuit correctly held, Iowa law provides the extensive due process safeguards outlined in *Fuentes* and its progeny. To bring a replevin action in Iowa, the plaintiff must file a verified petition stating more than just conclusory allegations. The petition must identify facts describing the property; its value; the basis for the plaintiff's right to present possession of the property; the extent of its interest in the property; and the alleged cause of detention thereof according to the plaintiff's best belief. *See* Iowa Code § 643.1. The law requires judicial supervision over the replevin, providing that a clerk shall issue a writ "upon direction of the court after notice and opportunity for such hearing as it may prescribe." Iowa Code § 643.5.

Once the writ is issued, an officer must execute the writ by taking possession of the property described in the writ. *See* Iowa Code § 643.10. To obtain immediate delivery of the property by the officer, the plaintiff must provide for indemnification of the debtor for a wrongful attachment by

filing a bond in a penalty at least equal to twice the value of the property sought to be taken and if a return is awarded, pay all costs and damages that may be adjudged against the plaintiff. *See* Iowa Code §§ 643.6, 643.7. The debtor may also obtain immediate return of any property taken by the sheriff by posting its own bond. *See* Iowa Code § 643.12.

Contrary to Petitioner's assertion, Iowa law also allows for a replevin defendant to obtain an immediate post-deprivation hearing. It must be noted *Mitchell* does not require such a hearing, but merely the *opportunity* for a hearing at the request of the injured party. *Mitchell*, 416 U.S. at 609. A statute need not specify when a post-deprivation hearing must occur if the language can be interpreted as providing for an immediate hearing. *See id.* at 622; *Watertown Equipment Co. v. Norwest Bank Watertown, N.A.*, 830 F.2d 1487, 1492 (8th Cir. 1987).

Nor does the availability of such a hearing need to be specified in the replevin statute itself. Petitioner argues *Fuentes* "implicitly held" general motion practice is not a substitute for a provision in a replevin statute providing for a post-deprivation hearing. (Petitioner's Brief at p. 7, nn.2, 14). *Fuentes* held no such thing. *Fuentes* merely observed the two state replevin laws at issue in that case allowed the replevin defendant to initiate a post-seizure hearing pursuant to civil procedure rules. *Fuentes*, 407 U.S. at 78, n.9. The statutes were not invalidated as a result of this procedural mechanism, but rather because prejudgment repossession was allowed without notice, hearing, or judicial supervision. *See Id.* at 93.

Iowa law may be readily interpreted to provide for the postdeprivation hearing Petitioner alleges must be available.

Iowa Code § 643.2 provides replevin actions shall be tried by "ordinary proceedings", which incorporate general motion practice under Iowa Rule of Civil Procedure 1.431. Pursuant to Rule 1.431, a debtor may file an immediate motion to void or vacate the writ and obtain a prompt hearing. Although Petitioner complains the state did not hold an evidentiary hearing until five weeks after the writ was executed (Petitioner's Brief at 5), this delay cannot be attributed to Iowa's replevin laws. Nor can Petitioner complain it was prejudiced by the fact the replevin statute only appears to allow a debtor to post a bond for immediate return of the property before the sheriff has released the property to the replevin plaintiff. The Sheriff did not turn the replevied property over to the Bank until five days after execution of the writ. Petitioner could have attempted to timely post a bond to have the property returned but did not. Nor did it promptly request a hearing after execution of the writ. As the district court noted:

> Mr. Dincer indicated in his deposition that he had hired an attorney — the one representing him in this action — within three days of July 14, 1995, the date the order and writ were issued. Dincer Depo. at 195. Audio Odyssey did not move to dismiss the replevin action until early August 1995. In noting this, the Court has no intent to question plaintiffs' counsel's strategy or methods; rather, plaintiff repeatedly complains that the premises were locked until late August, 1995, and the Court believes this appears to have occurred at plaintiffs' option. Additionally, Mr. Dincer testified that he could have obtained capital to cover the loan, if the Bank had afforded him an opportunity. Presumably, he could also readily

> obtain capital to post a bond and regain possession of personal property. Again, this is a postdeprivation option he chose not to exercise. The court cannot find the replevin procedure unconstitutional simply because plaintiffs made strategic decisions which postponed opportunity to repossess the merchandise.

(Appendix D, p. 102a).

Iowa law affords procedural protections to a debtor to challenge a prejudgment replevin. The fact a debtor did not "actually utilize [the] procedures does not mean that he was denied due process, because the Due Process Clause requires merely a meaningful *opportunity* to be heard." *Marler v. Missouri State Bd. of Optometry*, 102 F.3d 1453, 1457 (8th Cir. 1996).

The Eighth Circuit concluded Iowa's replevin scheme passes constitutional muster because it contains the necessary procedural safeguards. *See Audio Odyssey, Ltd.*, 245 F.3d at 731-735. As the Supreme Court stated when it determined Louisiana's sequestration statute was constitutional, "the initial hardship to the debtor is limited, the seller has a strong interest, the process proceeds under judicial supervision and management, and the prevailing party is protected against all loss." *Mitchell*, 416 U.S. at 618-19.

III.

THE COURT SHOULD DECLINE TO REVIEW PETITIONER'S ARGUMENTS REGARDING SERVICE OF ORIGINAL NOTICE BECAUSE PETITIONER DID NOT PRESERVE ERROR ON THIS ISSUE AND EVEN IF IT HAD, THE ARGUMENT MUST FAIL

A. Petitioner Has Not Preserved Error

Petitioner argues the district court lacked jurisdiction over the replevin action because the bank did not serve an "original notice" of the action pursuant to Iowa Rule of Civil Procedure 1.302 (formerly Rules 49, 50 and 52) prior to obtaining the writ of replevin. This alleged error has not been preserved for review.

Although Petitioner made brief reference to the timing of the original notice in the facts sections of its Resistances to Respondents' Summary Judgment Motions and facts section of its Brief supporting its Eighth Circuit appeal, Petitioner did not argue to either the district court or the Eighth Circuit that non-compliance with the Iowa civil procedure rules relating to original notices deprived the court of jurisdiction or violated Iowa law. A question presented in a petition for writ of certiorari which was not raised in the Court of Appeals is not properly before this Court. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). As a matter of law, Petitioner's arguments as to any perceived deficiency in the original notice have been waived and cannot be considered for the first time on appeal to this Court.

B. Iowa and Federal Law Do Not Require Service of an Original Notice Prior to a Prejudgment Writ of Replevin.

Contrary to Petitioner's assertions, as discussed in Section II above, prior notice of a writ of replevin in particular is not necessary so long as other procedures are in place to guarantee protection against erroneous seizures. *See Mitchell*, 416, U.S. at 605-606. *Mitchell* specifically held the lack of a notice requirement is not fatal where other procedural protections (such as those found in the Iowa law) are present. *Mitchell*, 416 U.S. at 616. So long as the State provides postdeprivation remedies, the "normal predeprivation notice and opportunity to be heard is pretermitted." *Parratt v. Taylor*, 451 U.S. 527, 538 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 328 (1986).

Similarly, Petitioner's arguments regarding original notice requirements under Iowa law and the attendant alleged lack of personal jurisdiction are misplaced. First, as stated in Respondents' Statement of Facts, the record is not clear as to whether original notice was served with the writ of replevin. Second, even assuming an original notice was not served at the time the writ was served, such oversight did not divest the court of personal jurisdiction over Petitioner under Iowa Rule of Civil Procedure 1.302 (formerly Rules 49, 50 and 52).

Rule 1.302 provides notice of an action that has been filed be served upon a defendant. Such notice is called "original notice." *See* Iowa R. Civ. Pro. 1.302. Petitioner argues that because Iowa Code § 643.2 provides for trial of a replevin action by "ordinary proceedings", strict compliance with Rule 1.302's notice provisions is necessary. However,

Iowa Code § 643.5 specifically excepts compliance with this rule in cases where a replevin plaintiff obtains a prejudgment writ of replevin and complies with Chapter 643's other procedural safeguards. Iowa law dictates this narrow exception override the general rule:

> If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision.

Iowa Code § 4.7. This rule of statutory interpretation requires the specific notice provisions of the replevin statute apply in place of the more general notice provisions of the Iowa Rules of Civil Procedure.

Finally, Petitioner's claim of defective notice must fail under a case cited by them, *Fisher v. Keller Industries, Inc.*, 485 N.W.2d 626 (Iowa 1992), *overruled on other grounds by Thomas v. Hansen*, 524 N.W.2d 145 (Iowa 1994). In *Fisher*, the plaintiff workers' compensation carrier filed suit to claim a lien on a third-party recovery obtained by an injured worker. *Fisher*, 485 N.W.2d at 627. Although the carrier provided a copy of the Petition to the defendant, the carrier did not serve an original notice. *Id.* In response to the Petition, the defendant filed a motion to dismiss alleging the failure to serve the notice yet claiming entitlement to immediate distribution of the third-party judgment. The court rejected the defendant's argument the lack of an original notice deprived the court of personal jurisdiction. *Id.* at 628. Rather, the court held, the defendant's filing of a Motion to Dismiss requesting affirmative relief constituted his

voluntary appearance and submission to the court, negating the need for service of process of an original notice. *Id.* at 628. The court explained:

> Challenges to the district court's personal jurisdiction may now be asserted in a pre-answer motion, in the answer, or in an amendment to the answer made within twenty days after service of answer. Abolition of the special appearance does not change the basic and universal rule that there are only two ways to acquire personal jurisdiction: (1) by service of process on the defendant; or (2) by defendant's voluntary appearance and submission.
>
> . . . .
>
> Hartford moved to dismiss Fisher's application for declaratory judgment because it had not been served with original notice. But in the same motion Hartford prayed for affirmative relief, claiming it was "entitled by clear provisions of statutory law to immediate distribution of the proceeds of the third-party judgment. . . ."
>
> Hartford cannot have it both ways, challenging jurisdiction and in the same motion asking the court to exercise jurisdiction in its favor. We agree with Fisher that this constituted a general appearance and a submission to jurisdiction.

Id. at 628.

Similarly, in this case, on August 4, 1995, three weeks after the filing of the replevin petition and prior to the Bank's service of an original notice, Petitioner filed a motion to dismiss, claiming it had not been served with original notice. However, in that same motion it prayed for affirmative relief, claiming it was entitled to an order requiring the sheriff to return all seized property and to preserve the bond filed by the Bank. It also concurrently filed a Jury Demand. By making this prayer for affirmative relief, Petitioner submitted to jurisdiction and waived any claim of irregularity in the service of an original notice.

Accordingly, even if preserved, Petitioner's argument must fail.

CONCLUSION

Petitioner was the successful party in the Court of Appeals and the case has been remanded for a decision on the merits on Petitioner's Claims. Further, Petitioner has presented no "compelling reason" for the Supreme Court to exercise its certiorari jurisdiction. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 30 2002
OFFICE OF THE CLERK

No. 02-88

IN THE

Supreme Court of the United States

AUDIO ODYSSEY, LTD., DOGAN A. DINCER, and ANN M. DINCER,

Petitioners,

v.

BRENTON FIRST NATIONAL BANK, an Iowa Banking Corporation, MICHAEL M. BLADEL, Sheriff of Scott County, Iowa, JOHN M. NORRIS, Deputy Sheriff of Scott County, Iowa, CHARLES A. BARTON, Deputy Sheriff of Scott County, Iowa, JOHN C. BRADLEY, CHRIS A. PIEPER, MERCHANTS BONDING COMPANY (Mutual), BERNARD J. HOFMANN, and ANDERSON & NELSON, P.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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16 pp

STATEMENT PURSUANT TO RULE 29.6

The corporate disclosure statement regarding Petitioner, Audio Odyssey, Ltd., was set forth at page *iii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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ARGUMENT

I. Misstatement Of Material Facts In Brief In Opposition Relevant To Questions Before The Court.

The state court replevin action was never settled as alleged in Respondents' Brief In Opposition ("Brief") on page 5. On August 10, 1999, the state court refused to allow the Bank another continuance. (Iowa District Court Ruling on Motion, L-55.) With a jury trial looming in state court, the Bank dismissed its own petition in replevin pursuant to Iowa Rule of Civil Procedure 215, which is **self-executing**. Only through the insistence of replevin defendants did the court address the matter. (Iowa District Court Order, L-56.) Iowa Rule of Civil Procedure 215[1] stated in relevant part:

> A party may, without order of court, dismiss that party's own petition, counterclaim, cross-claim, cross-petition, or petition of intervention, at any time up until ten days before the trial is scheduled to begin. . . .

(Iowa Rules of Court State and Federal 1999.) Audio Odyssey's personal property was never returned nor were Petitioners ever compensated.

Not knowing the eventual outcome of the replevin suit in 1997, Petitioners filed their federal complaints. This was more than two years before the Bank dismissed its state court petition which occurred more than four years after the seizure.

"Original Notice" (Iowa's "Summons") was served on Mr. Dincer at his home on August 9, 1995, three weeks after the replevin, and return of service was filed with the clerk on August 10, 1995. Respondents' state in (page 6) of their Brief, "[t]he issue of documents that were served is in dispute. Discrepancies exist as to the method and nature of documents served," implies that original notice was served as required by the Iowa Rules of Civil Procedure. It was not. Respondents contradict their own implication on page 21 of their Brief which states:

---

1. Iowa Rules of Civil Procedure have been since renumbered. Petitioners' citations are made to the Rules as they were in effect when the actions occurred.

> Similarly, in this case, on August 4, 1995, three weeks after the filing of the replevin petition and prior to the Bank's service of an original notice, petitioner filed a motion to dismiss, claiming it had not been served with original notice.

The Bank's Petition in Replevin stated:

> 13. Iowa Code Section 643.5 provides the court with the discretion to waive notice and hearing. . . .
>
> WHEREFORE, plaintiff prays the court waive notice and hearing. . . .

Although Respondents claim "[t]he following week, all of the property on the premises, furniture, equipment and machinery, were inventoried, removed and turned over to the Bank in the care of John C. Bradley," the deputy sheriff, while placing and maintaining large red "NO TRESPASSING" signs on the doors with the sheriff's name on them, turned over all personal property and the business premises to the banker on July 14, 1995 before returning to conduct an inventory later the next week. The Bank had retained the locksmith, had the keys and had unfettered access to the premises.

In a hearing begun on August 22, 1995, but never concluded, due to the Bank's attorneys' conflict of interest and requests for continuance, John Bradley when asked when he got the keys, testified:

> A. "We had the keys once the locks were changed."

On March 15, 1999, the Scott County defendants filed a Statement Of Material Facts As To Which There Is No Genuine Issue. Paragraph 7 states:

> . . . Deputy Norris served the Writ of Replevin[2], ordered the customers and employees to leave, obtained keys to the premises and gave them to John C. Bradley.

(Footnote added.)

---

2. Another discrepancy here since the County Respondents later claim that the "order" was also served, p. 4, Brief. It wasn't.

In an affidavit given on December 7, 1999, Doug Retherford, News Director at KWQC Channel 6, stated:

> On August 16, 1995, KWQC broadcast news regarding the closing of Audio Odyssey. The news footage included movers loading up a truck with equipment as well as a close-up of the "No Trespassing by Order of the Sheriff Department" sign placed on the front door of Audio Odyssey.

Respondents state, p. 5, Brief:

> Although the practical effect may be the same, it was never the intent of any party to knowingly seize the real estate.

When deposed in 1999, Charles Barton testified:

> A. On July 14, 1995, I glanced at the writ of replevin and assumed the real estate was part of the taking.

At the time of the occurrence, he told the Bank's attorney that the Bank needed moving vans, initially recognizing that a replevin was for personal property (the property would have to be carried out and inventoried and put into moving vans). The response from the Bank's officer through its attorney was: "Can't you lock them out?" Sgt. Barton then agreed. Isn't the intent to (indefinitely) lock out the Petitioners (change the locks) the intent to seize the real estate?

The last paragraph on page 6 states:

> Audio Odyssey was in default on its loan. The Bank was concerned that collateral for the loan was at risk. The Bank had received notice that the insurance policy on the collateral had been canceled.

The following facts have never been controverted. On July 13, 1995, the day before the filing of the Petition in Replevin and the execution of the writ, Mr. Dincer, paid his June and July monthly payments on the loan. He instructed one of the Bank's commercial tellers, Annette Haskins, to apply the payment to the June and July payments on Audio Odyssey's

outstanding loan to Brenton Bank, an SBA guaranteed note. She accepted the payment which brought the loan payment current. At that same time Mr. Dincer personally informed Mr. Pieper, Vice President of the bank who was present at the time of the payment, that he was making these two payments. Mr. Pieper acknowledged to Mr. Dincer at that time that he understood, he made no protest, and he did not tell Mr. Dincer that, contrary to Mr. Dincer's instructions regarding the application of these payments, the bank would apply these amounts elsewhere. Nor did he inform Mr. Dincer that the Bank would sue him the next day (in violation of its SBA contract with Audio Odyssey, the Dincers and the SBA) in part based on a failure to make such payments.

Collateral for the loan also included an 85% guaranty from the SBA, a personal guaranty from the Dincers and second mortgages on two pieces of real estate, one of which was the Dincers' home.

The SBA loan had been made pursuant to a Loan Guaranty Agreement between the SBA and the Bank, which required prior written consent from the SBA to accelerate the maturity of any note and/or sue upon any loan instrument, as did 13 C.F.R. § 120.201-1 (1995). The Bank had not obtained this written permission.[3]

Audio Odyssey's insurance was in effect on July 14, 1995. Carol J. VanHoorebeck, a representative from Trissel, Graham and Toole, Audio Odyssey's insurance carrier, testified at her deposition on October 14, 1998:

> The only thing I could say is that as of July 14th, coverage was in force with a limit of $165,000.

The Bank states it had a Notice to Cancellation of insurance, but has never produced same. It does not exist.

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3. To its Petition in Replevin, the Bank had attached the Business Security Agreement and the Note. It did not include the Loan Guaranty Agreement (Deferred Participation); the Loan Authorization; the Guaranty on SBA Form 148 or the two mortgages signed by the Dincers on SBA Form 928.

Finally, Petitioners did act. The Dincers went to the courthouse to obtain a copy of the Petition in Replevin; they attempted to negotiate with the bank; they contacted the SBA; they hired an attorney who researched, wrote and filed a motion to dismiss. They did all of this with their business records seized. Iowa's replevin statute prohibited cross-claims, counterclaims and joinder of claims under sanctions. *Citizens State Bank* v. *Harden*, 439 N.W.2d 677 (Iowa App. 1989).

The irony of Respondents' implication that Petitioners were too slow in their response, is that if Respondents had been a little less hasty and reckless in their actions, they might not find themselves trying to defend their behavior in a § 1983 lawsuit. Respondents argue that certain material facts are in dispute, facts which Petitioners have demonstrated uncontrovertibly. Like much of these proceedings, this stands the law of summary judgment on its head in violation of *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322, (1986) and *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 295 (1986).

II. The Supreme Court Should Grant Petitioners' *Writ For Certiorari* Because The Eighth Circuit's Decision Conflicts With Prior U.S. Supreme Court Decisions, Iowa Supreme Court Decisions And Iowa Law.

The compelling reason why the Supreme Court should exercise its *certiorari* jurisdiction over this case lies in the precedent-setting effect the Eighth Circuit's decision would have on future applications of the Iowa replevin statute. Respondents' assertion on page 9 of their Brief that "the court should decline to exercise its *certiorari* jurisdiction where petitioner has prevailed, the case has been remanded, and Petitioners have the opportunity to seek relief and damages" not only ignores the Fourteenth Amendment but also the ramifications of allowing the Eighth Circuit's decision to stand which now sanctions this type of extreme *ex parte* action without the Respondents being served an "Original Notice." This is contrary to Iowa's historical legal tradition of strict compliance with rules regarding "Original Notice." *See Suit Preclusion Through Noncompliance with Iowa Original Notice Requirements*, 55 Iowa L. Rev. 1049 (1970).

Respondents' footnote 4 suggests the Supreme Court does not have jurisdiction in this case. However,

> Congress has provided, in 28 U.S.C. § 1254(1), that the Supreme Court may review cases in the federal courts of appeal by '*writ of certiorari* granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or degree.' The jurisdiction thus granted is plenary in nature. *See Forsyth* v. *Hammond*, 166 U.S. 506, 511-13 (1897). . . . As long as the jurisdiction of the court of appeals has properly been invoked and a timely petition for *certiorari* is filed, the Supreme Court has jurisdiction to take the case whatever its status in the lower court. The *Conqueror*, 166 U.S. 110, 113-14 (1897).

(R. Stern, E. Gressman, S. Shapiro, Supreme Court Practice 40-41 (6th Ed. 1986).)

In *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945), a case that was remanded by the appeal court for a new trial, the court found:

> The cause was remanded for trial in accordance with the ruling of the Circuit Court of Appeals. We think we should review that ruling inasmuch as it is fundamental to the further conduct of the case.

(*Id.*, 377.)

A. *It Is Appropriate For The Court To Review The Subject Of Personal Jurisdiction When Determining Whether A Statute Is Constitutional.*

In both *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346 (1981), and *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144 (1970), the issues Petitioners wanted to raise before the court were not directly related to the issues the court chose to address. In contrast, the determination of the constitutionality of the Iowa Replevin Statute has been one of the central themes before both the district and appeals courts.

B. ***Under The Iowa Rules Of Civil Procedure "Original Notice" Is Required Before The Court Obtains Personal Jurisdiction.***

Rule 1 of Iowa Rules of Civil Procedure states:

> These rules shall govern the practice and procedure in all courts of the state, except where they expressly provide otherwise, or statutes not affected hereby provide different procedure in particular courts or cases.

(Iowa Rules of Court State and Federal 1995.)[4]

Section 643.2 of the (Replevin) Code of Iowa (1995) states:

> The action shall be by ordinary proceedings, but there shall be no joinder of any cause of action not of the same kind, nor shall there be allowed any counterclaim.

The Iowa Supreme Court has consistently held that the Rules of Civil Procedure concerning "Original Notice" must be strictly adhered to before the court obtains jurisdiction. In discussing Rule 50, the relevant portion being "The original notice shall be directed to the defendant, and signed by plaintiff or his attorney with the signer's address . . .," the Iowa Supreme Court said:

> It is too well settled for discussion that compliance with Rule 50 is required in order to obtain jurisdiction. Compliance with this rule is the only method by which a plaintiff may compel a defendant to submit to the court for a binding adjudication of their differences. Our previous holdings have firmly established that the provisions of Rule 50 are mandatory and that the rule has statutory status. (Citations omitted.)

(*White* v. *O'Neill*, 164 N.W.2d 79, 80 (Iowa 1969).)

Ten years later, the Iowa Supreme Court affirmed the district court's finding that there was no fatal defect in an original notice served in a foreclosure action but finding:

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4. *See* n.1, p. 1.

> A substantial defect renders an original notice fatally defective; any judgment based thereon is void.

(*Holmes* v. *Polk City Sav. Bank*, 278 N.W.2d 32, 34 (Iowa 1979).)

Finally, Respondents misconstrue the relationship in *Fisher* v. *Keller Industries, Inc.*, 485 N.W.2d 626 (Iowa 1992), to Petitioners' case. When Petitioners filed their motion to dismiss[5] on August 4, 1995, they contested the jurisdiction of the court. They certainly did not submit themselves retroactively to personal jurisdiction at the time of the seizure. It is the action the court took on July 14, 1995 that is central to the issue of personal jurisdiction in this case. On that date, when Judge Havercamp issued an order for the seizure of Audio Odyssey's personal property, the court had not obtained personal jurisdiction as required by the Iowa Rules of Civil Procedure 49 and 50.

The Eighth Circuit's decision found that "ordinary proceedings" incorporated the Iowa Rules of Civil Procedure, yet allowed that the court had discretion to order the seizure of personal property without following those rules, specifically Rule 49, Rule 50 and Rule 82(g) which required the service of "Original Notice" and proof of service to be filed with the clerk before action taken. This decision undermines the very foundations of Iowa's procedural due process structure.

C. *Iowa Code § 643.5 Does Not Allow The Court To Waive Notice.*

Iowa Code § 643.5 does not "except compliance" with the Iowa Rules of Civil Procedure as Respondents allege. It specifically states " . . . after notice. . . . " The law was changed in 1973 to comply with *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) and *Thorpe Credit, Inc.* v. *Barr*, 200 N.W.2d 535 (Iowa 1972). All the discussion of subsequent cases, i.e., *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974), is simply a red herring.

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5. The traditional special appearance to contest jurisdiction was abolished in Iowa and a contest to jurisdiction must be combined with any other basis for dismissal.

In Iowa when the law requires the court to take action in a civil case, it automatically invokes the procedural protections incorporated in the Iowa Rules of Civil Procedure. It is true that in *Interfirst Bank, Dallas, Texas* v. *Hanson*, 395 N.W.2d 857 (1986), the Iowa Supreme Court found the Iowa Replevin Law constitutional stating:

> As to statutory replevin, the United States Supreme Court in the landmark case of *Fuentes* v. *Shevin*, (citation omitted), struck down state statutes that allowed prejudgment replevin without notice **and** a right to contest prior to the seizure of the chattels, holding that such statutes worked a deprivation of property without procedural due process. We also determined that our previous replevin statutes were defective because of due process infirmities. *Thorpe Credit, Inc.* v. *Barr*, 200 N.W.2d 535, 537 (Iowa 1972). Our present prejudgment replevin section meets the requirements of due process. Iowa Code § 643.5 (1985).

(Emphasis added.) (*Id.* 860.)

In *Thorpe*, the Iowa Supreme Court found:

> We are bound under the holding in *Fuentes* to declare unconstitutional and invalid sections 643.5 and 643.6, The Code, for their want of notice **and** judicial hearing requirements prior to seizure.

(Emphasis added.) (*Thorpe*, 536, 537.)

Both *Thorpe* and the new statute predated *Mitchell* v. *Grant*. The Eighth Circuit's decision would have it that after the Iowa Supreme Court declared the replevin law unconstitutional because of its lack of required notice and judicial hearing before seizure, the Iowa Legislature changed the law so it still had no required notice and no judicial hearing before seizure of property. Then thirteen years later, the Iowa Supreme Court found the Iowa Replevin Statute constitutional because it had no required notice provision and no judicial hearing. The Eighth Circuit's decision disenfranchises Iowa citizens of rights ensured to them by their Legislature.

CONCLUSION

The Fourteenth Amendment argument rests not only on general notice requirements under due process, but also on the specific Iowa rules requiring "original notice" (49, 50 and 82g). The legislative scheme further features the Rule 215 dismissal leaving the replevin defendants adrift without a rudder or compass.

> Rules, especially those which fix jurisdictional matters, are not mere technicalities to be observed or ignored as the particular exigencies dictate. They are vital to the proper conduct of court business. . . . they have substance, in that they lay down definite rules which are essential in court proceedings so that those involved may know what may and may not be done, and confusion, even chaos, may be avoided. They are necessary; without them litigants would be adrift without rudder or compass. . . .

Gordon v. *Doden*, 154 N.W.2d 146, 148 (Iowa 1967).

WHEREFORE, Petitioners pray this court to allow their *Writ of Certiorari* and exercise its jurisdiction and reverse the upholding of summary judgment to these Respondents on the issue of the Fourteenth Amendment.

Respectfully submitted,

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